Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROBERT E. GABLE, - - - - - - *Petitioner*

versus

PAUL E. PATTON; A.B. CHANDLER, III; KENTUCKY REGISTRY OF ELECTION FINANCE; DONALD L. COX; MORRIS E. BURTON; JAMES E. BOYD; and JOHN Y. BROWN, III,
- - - - - - - - - - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT ABELL
ACLU Cooperating Attorney
P.O. Box 983
Lexington, Kentucky 40588-0983
(606) 254-7076

KATHLEEN M. SULLIVAN
559 Nathan Abbot Way
Stanford, California 94305-8610
(650) 725-9875
Counsel of Record

DAVID A. FRIEDMAN
General Counsel
American Civil Liberties Union
of Kentucky
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 581-1181

Counsel for Petitioner

November 25, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

7 OPP

QUESTIONS PRESENTED

1. Does a public campaign funding scheme unconstitutionally penalize a nonparticipating candidate's rights of free speech and association if, upon that candidate's collection or expenditure of a specified amount of private campaign funds, the State releases participating candidates from otherwise applicable contribution and expenditure limits and matches their further fundraising efforts two-to-one with public funds ?

2. Does a total ban on outside contributions to an unsubsidized candidate's campaign during the twenty-eight days preceding an election violate that candidate's rights of free speech and association?

PARTIES

The petitioner in this Court is Robert E. Gable, who was the plaintiff-appellant/cross-appellee below. The respondents in this Court, who were the defendants-appellees/cross-appellants below, are Paul E. Patton, in his official capacity as Governor of the Commonwealth of Kentucky; A. B. Chandler, III, in his official capacity as Attorney General of the Commonwealth of Kentucky; the Kentucky Registry of Election Finance; Donald L. Cox, in his official capacity as Chair of the Kentucky Registry of Election Finance; Morris E. Burton, in his official capacity as Franklin County Commonwealth Attorney; James E. Boyd, in his official capacity as Franklin County Attorney; and John Y. Brown, III, in his official capacity as Secretary of State for the Commonwealth of Kentucky.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), is reported as *Gable v. Patton*, 142 F.3d 940 (6th Cir.1998). The unreported decision of the district court (Pet. App. 28a-46a) is *Gable v. Jones*, Civil No. 95-12 (E.D. Ky., Mar. 29, 1996).

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. Both sides' petitions for rehearing were denied on July 28, 1998. On October 22, 1998, the Honorable John Paul Stevens, Circuit Justice for the Sixth Circuit, granted petitioner's application for an extension of time, through November 25, 1998, to file this petition for a writ of certiorari. The jurisdiction of this Court to review this petition for a writ of certiorari is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment I, in relevant part provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Kentucky Revised Statute § 121A.030, entitled "Campaign expenditure limitations," provides in relevant part:

> (1) A qualifying slate of candidates for Governor and Lieutenant Governor that receives transfers from the [public campaign finance] fund may make campaign expenditures which, in the aggregate, including the expenditure of transfers from the fund, shall not exceed one million eight hundred thousand dollars ($1,800,000) in connection with a primary election campaign and one million eight hundred thousand dollars ($1,800,000) in connection with a regular election campaign, subject to the provisions of KRS 121A.080(4) and (5), and three hundred thousand dollars ($300,000) in connection with a runoff primary campaign. . . .
>
> (5) No slate of candidates for Governor and Lieutenant Governor shall knowingly accept any other campaign contribution during the twenty-eight (28) days immediately preceding a primary or regular election and during the fourteen (14) days immediately preceding a runoff primary except:
>
> (a) A qualifying slate of candidates that has elected to become eligible for fund transfers or who may in the future elect to become eligible for fund transfers shall be released from expenditure limitations following a certification by the registry pursuant to KRS 121A.080(4)

> or (5) that a slate of candidates that has not elected to become eligible for fund transfers has received contributions or made expenditures in excess of the expenditure limits provided in subsection (1) of this section; . . . .

Kentucky Revised Statute § 121A.080, entitled "Amounts transferred from fund," provides in relevant part:

> (1) . . . . Qualifying slates of candidates may receive transfers from the fund according to the matching ratio . . . specified in KRS 121A.060(3)(c) . . . .Subject to subsections (4) and (5) of this section, a transfer entitlement voucher may document total qualifying contributions of not less than $300,000 but not more than $600,000 for a primary or regular election for receipt of total fund transfers equal to twice the amount of qualifying contributions documented . . . .
>
> (4)(a) If the registry makes a finding of fact, after a public hearing of which all slates of candidates for Governor and Lieutenant Governor shall be notified, that in the course of a primary election, runoff primary election, or regular election campaign a slate of candidates for Governor and Lieutenant Governor that has not accepted the provisions of this chapter has received contributions or made expenditures in excess of the expenditure limit as provided in KRS 121A.030(1), the registry shall certify that those slates of candidates that have elected to become eligible for fund transfers . . . shall be released from expenditure limitations and may receive and sub-

> mit for fund transfers qualifying contributions in excess of $600,000. Slates of candidates released from expenditure limitations in a primary or regular election shall continue to be eligible to receive transfers from the fund. . . .
>
> (5) Nothing in this section shall prevent any slate of candidates from notifying the registry in writing that its campaign committee has received contributions or made expenditures in excess of the expenditure limitations as provided in KRS 121A.030(1). . . .

Kentucky Revised Statute § 121A.060, entitled "Certification of qualification to receive transfer from fund," provides in relevant part:

> (3) The registry shall immediately review the request of a slate of candidates for certification to receive a transfer from the fund. The request for certification shall include:. . . .
>
> (c) The financial reports filed by or on behalf of the slate of candidates as of the date of the request for certification which indicate that the slate of candidates has raised a threshold qualifying amount in individual qualifying contributions for a transfer from the fund at a two (2) for one (1) matching ratio; . . . .

STATEMENT OF THE CASE

This case involves a First Amendment challenge to several provisions of Kentucky's public funding scheme for statewide elections. Under laws first implemented in its 1995 gubernatorial election, Kentucky provides two-for-one public matching funds to any gubernatorial slate in a contested election that agrees to limit private contributions to

$600,000 in each election, primary and general, and thus to limit its total expenditures in each election to $1.8 million — the sum of the $600,000 maximum in private funds and $1.2 million in public matching funds. *See* Kentucky Revised Statutes ("KRS") §§ 121A.060(1), 121A.060(3)(c), 121A.030(1). The "28-day window" provision, KRS § 121A.030(5), bars both participating and nonparticipating slates from accepting campaign contributions during the twenty-eight days immediately preceding a primary or general election campaign. But under KRS § 121A.030(5)(a), the "trigger" provision, if an opposing slate that has declined to participate in the public subsidy scheme exceeds $1.8 million in private contributions or expenditures, a publicly funded slate is released from the $1.8 million expenditure limit and from the contribution ban, and is guaranteed from the public fisc two dollars for every one private dollar it raises.

Petitioner Robert E. Gable ("Gable") was a candidate for governor in Kentucky's 1995 Republican primary, and has expressed his interest in running for that office again. Gable chose not to participate in the Kentucky public funding scheme and not to receive public campaign funds. In a complaint filed in the United States District Court for the Eastern District of Kentucky during the 1995 primary campaign, he challenged as facially unconstitutional several provisions of Kentucky campaign finance law. Gable named as defendants various state and local officials and the agency responsible for enforcing the campaign finance laws (collectively "the State"). The parties resolved some issues, but ultimately presented five issues to the district court on cross-motions for summary judgment. On March 29, 1996, the district court, which had jurisdiction under 28 U.S.C. §§ 1331 and 1343, entered a final judgment granting summary judgment to Gable on one issue and to the State on all others. Both sides appealed. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment in its entirety on April 30, 1998. *Gable v. Patton*, 142 F.3d 940

(6th Cir. 1998) (Pet. App. 1a-27a). The court of appeals denied rehearing and rehearing *en banc* on July 28, 1998.

The court of appeals found that the "trigger" provision did not penalize a nonparticipating candidate's right to make political expenditures free of a government-imposed ceiling. The court conceded that benefits provided to participating candidates can become unconstitutionally coercive if they are sufficiently overwhelming. It conceded too that "the Trigger is certainly more coercive than the federal campaign finance scheme for presidential elections" upheld by this Court in *Buckley*, Pet. App. 14a, and that "participation will be the rational choice in the large majority of cases," Pet. App. 15a. But it held nonetheless that the trigger did not go "over the line of unconstitutional coercion." Pet. App. 15a.

The court of appeals likewise upheld the ban on outside contributions during the last four weeks of an election campaign, *see* Pet. App.17a-19a, although it invalidated the ban as applied to candidates' contributions to their own campaigns, *see* Pet. App. 19a-24a. The court conceded that forcing candidates to calculate and meet their fundraising needs for the remainder of the campaign a full month before an election "is not a trivial restriction," but nonetheless concluded that "such a restriction is justified by Kentucky's interest in combating corruption." Pet. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

Introduction

This case raises issues of serious national importance that were not resolved by this Court's decision in *Buckley v. Valeo*, 424 US. 1 (1976). Unable since *Buckley* to enact political expenditure limits directly, a growing number of states are adopting novel schemes designed to inhibit political expenditures indirectly. Some, like Kentucky, give participating candidates favorable public subsidies when their nonparticipating opponents raise or spend

campaign funds above a set amount. *See, e.g.*, The Maine Clean Election Act, 21 A.M..R.S. § 1125 (9). Indeed, two states just enacted such measures as ballot propositions in the last election. *See* Arizona Citizens Clean Elections Act, 1998 Ballot Proposition 200; Massachusetts Clean Election Law, 1998 Ballot Measure 2, Mass. Gen. Laws, ch. 55A §11. Others simply release participating candidates from otherwise applicable expenditure or contribution limits once a nonparticipating candidate exceeds a state-approved level of fundraising or spending. *See, e.g.*, Cal. Gov. Code § 85404; Colo. Rev. Stat. Ann. § 1-45-105; Mich. C.L.A. 169.269(8); Minn. Stat. § 10A.25 sub. 10 (a); R.I. Gen. Laws § 17-25-24. Advocates of campaign finance reform are actively seeking to promote similar efforts in other states. *See* Cary Goldberg, *2 States Consider Boldly Revamping Campaign Finance*, N.Y. Times, Oct. 19, 1998, at p.A1.

Whether such measures unconstitutionally penalize nonparticipating candidates' rights to spend political money free of government-imposed limits is an issue requiring this Court's urgent resolution. If this Court does not clarify the application of *Buckley* to such measures, one way or the other, they will be subject to multiple, disruptive lawsuits over the next electoral cycle. Uncertainty about the constitutionality of such measures will disturb the orderly process of electoral decisionmaking and might even cast into doubt the outcome of some future elections. The writ should be granted so that such disruption may be avoided and the first issue presented in this case resolved as soon as possible.

The writ should also be granted to resolve the second issue in this case: whether Kentucky's extraordinary ban on campaign contributions during the last month of an election conflicts with *Buckley* or other relevant precedents of this Court.

1. Whether the "trigger" provision unconstitutionally penalizes a nonparticipating candidate's exercise of the right to raise and spend political funds is a question of serious national importance warranting this Court's review.

Buckley v. Valeo, 424 U.S. 1 (1976), held that political expenditures implicate fundamental liberties of speech and association, and that government may not directly limit expenditures of private funds. *Id.* at 54. At the same time, *Buckley* upheld the provision of public subsidies to presidential campaigns on condition that participating candidates limit their campaign expenditures to a fixed amount. *Id.* at 56 n.75. But the presidential campaign funding provisions upheld in *Buckley* placed no limits on the amounts that nonparticipating candidates might raise or spend, nor did they contain any bonuses for participating candidates that might be triggered by nonparticipating candidates' behavior.

Kentucky, in contrast, does not seek merely to lure gubernatorial candidates with the carrot of public subsidies, but also threatens nonparticipating candidates with a substantial stick. If a nonparticipating candidate collects or spends funds above the $1.8 million ceiling to which participating candidates have agreed, the state will permit participating candidates to raise and spend funds in unlimited amounts, matching each private dollar raised with two dollars of public money. This public bounty will flow to the participating candidate no matter how much the nonparticipating candidate's fundraising prowess is due to the popularity of his ideas, and no matter how much the two-for-one matching ratio will distort the apparent popularity of the participating candidate. A candidate who seeks to walk away from the public campaign finance program in order to preserve his right to make unlimited campaign expenditures simply cannot do so. Rather, he is told that if he is too successful at fundraising, the state will respond by furnishing his opponent with twice as much money as that opponent is capable of raising on his own.

Nonparticipating candidates can avoid this potentially overwhelming response only by refraining from raising and spending more than $1.8 million in the first place. The trigger thus puts the nonparticipating candidate to a Hobson's choice: either don't amass or expend funds at levels to which you are constitutionally entitled, or do so on pain of Kentucky's publicly-financed retaliation on your opponent's behalf. Such a choice is "no choice at all." *New York v. United States*, 505 U.S. 144, 176 (1992).

The issue whether such a penalty conflicts with *Buckley* and other well-settled First Amendment law warrants this Court's review. It is well-settled that protected speech may not be made an automatic trigger for responsive hostile speech. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (invalidating right-of-reply statute as "exact[ing] a penalty" upon a newspaper's controversial speech); *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 9 (1986) (invalidating a compelled access requirement that "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"). And it is well-settled since *Buckley* that political expenditures are at the core of protected speech. *See, e.g., Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Thus, it would seem apparent, contrary to the holding of the court below, that a candidate's success at raising a large number of perfectly legal private political contributions likewise may not be made a trigger for a massive state-financed counterattack.

The court of appeals erred in suggesting that this penalty on private fundraising somehow dissipates because it is part of a public subsidy scheme, which by definition "must rely on incentives for participation." Pet. App. 15a. That suggestion misapprehends this Court's precedents. It is well-established that government need not subsidize the exercise of constitutional rights and may use its power of the purse to make some constitutional choices more attractive than others. But government plainly may not penalize the privately funded exercise of a constitutional

right or use selective subsidies to coerce a potential recipient into surrendering such a right.[1]

In order to avoid such impermissible penalty or coercion, conditions on a government subsidy scheme must leave a potential recipient who foregoes the subsidy no worse off with respect to constitutionally protected choices than he or she would have been had the funding program not existed. *See, e.g., Maher v. Roe,* 432 U.S. 464, 474 (1977) (upholding selective subsidy of childbirth but not abortion, reasoning that "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there"); *Harris v. McRae,* 448 U.S. 297, 317 (1980) (upholding similar federal law, reasoning that it "leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all"). Public funding conditions that would not be permissible if imposed directly — as Kentucky's $1.8 million political expenditure limit plainly would not be under *Buckley* — are constitutional only if they leave potential recipients the unfettered choice to avoid the condition by foregoing the subsidy. *See, e.g., Rust v. Sullivan,* 500 U.S.

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[1] *Compare, e.g., O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712 (1996) (impermissible penalty on speech and association of public contractor); *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) (impermissible penalty on government employees' off-duty expressive activities); *FCC v. League of Women Voters,* 468 U.S. 364 (1984) (impermissible penalty on public broadcasters' editorial expression); *Speiser v. Randall,* 357 U.S. 513 (1958) (impermissible penalty on speech and association of veteran tax beneficiary) *with Rust v. Sullivan,* 500 U.S. 173, (1991) (permissible nonsubsidy of abortion counseling and advocacy); *Regan v. Taxation With Representation,* 461 U.S. 540 (1983) (permissible nonsubsidy of charitable organizations' lobbying activity); *Maher v. Roe,* 432 U.S. 464 (1977) (permissible nonsubsidy of abortion).

173, 199 n.5 (1991) (upholding condition that federal family planning funds not be used to counsel or advocate abortion, reasoning that potential grant recipients "can choose between accepting [the] funds — subject to the Government's conditions. . . — or declining the subsidy and financing their own unsubsidized program").

In sharp conflict with this line of precedent, the Kentucky trigger provision both fetters the constitutionally protected choices of candidates who forego public campaign subsidies and leaves such candidates worse off than they would have been without any public financing program at all. Without the program, such a candidate may raise and spend as many legal private contributions as he or she wishes; with it, such fundraising success is threatened or hammered with a state-financed counterattack funded out of all proportion to the actual popularity of the opponent's ideas. Such a penalty is no more permissible in the public campaign funding context than in the context of any other public subsidy. *See Rosentiel v. Rodriguez*, 101 F.3d 1544, 1560 (8th Cir. 1996) (Lay, J., dissenting) (noting that the key issue in reviewing a public campaign subsidy is "whether a candidate who faces a choice not to limit her full access to political speech will be any worse off in choosing to do so").

The trigger warrants strict First Amendment scrutiny regardless of whether it serves as a deterrent to or penalty on the exercise of the right established under *Buckley* to raise and spend private political money without a government-imposed ceiling. The trigger in most cases will have the intended and predictable effect of discouraging gubernatorial campaigns from spending above $1.8 million, or of inducing candidates simply to accept the public funds with strings attached. As the court of appeals accurately observed, "there is only a narrow set of circumstances under which a candidate could make a financially rational decision not to participate. That situation is where the nonparticipating candidate intends to exceed the $1.8 million threshold and believes he will raise more than three

times the funds his participating opponents can raise." Pet. App. 14a. For this reason alone, the court below erred in declining to find the trigger provision unconstitutionally coercive. *See, e.g., VoteChoice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("There is a point at which [public financing] incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.").

But contrary to the court of appeals' suggestion, the trigger's constitutional infirmity would remain even if some candidates chose, despite its draconian consequences, to exercise their right to pursue private rather than public campaign funding. *Cf. Memorial Hospital v. Maricopa Co.*, 415 U.S. 250, 258 (1974) (applying strict scrutiny to durational residence scheme that "'operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration,'" even if actual deterrence of interstate migration was not shown) (citation omitted) (emphasis and ellipsis in original). In short, the flaw in the Kentucky trigger provision is that it makes extra public financing of participating campaigns contingent upon the nonparticipating candidate's exercise of constitutionally protected rights of speech and association in the first place. Government may not use the exercise of First Amendment rights as a predicate for systematic government-funded opposition. Whether or not its target capitulates, his or her rights have been seriously burdened.

Under the strict scrutiny that therefore should apply, the trigger provision cannot stand. It may not be justified by a state interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections," for this Court held in *Buckley* that such an interest "is wholly foreign to the First Amendment." 424 U.S. at 45. Such an interest, illegitimate in the regulatory context, does not become permissible in the context of a selective subsidy scheme — at least not one that effectively restricts the speech of nonparticipating candidates in order to enhance the speech of participating candidates.

To the contrary, *Buckley* upheld public financing of presidential campaigns on the basis that it "facilitate[d] and enlarge[d] public discussion and participation in the electoral process" *without* abridging discussion or participation by any candidate declining public funds. *Id.* at 92-93. Nor can the trigger be justified by an interest in reducing the escalating cost of political campaigns, for this Court held in *Buckley* that "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57.

Buckley did hold legitimate and substantial the government interest in combating the corrupting or apparently corrupting influence of large contributions on political candidates, but the trigger bears no relation, much less a close relation, to such an interest. As this Court held in *Buckley*, such an interest is fully served by "contributions limitations and disclosure provisions," and is insufficient to justify further restrictions "on the quantity of political expression." *Id.* at 55. Like the federal law at issue in *Buckley*, Kentucky's campaign statutes restrict the amounts of contributions and require their disclosure. *See* KRS §§ 121A.050, 121A.010(10). Thus, here, as in *Buckley*, the trigger is superfluous to any anti-corruption goal. Indeed, the trigger actually undermines any supposed goal of discouraging candidate dependence upon private donors, as its immediate effect is to send publicly financed candidates back into the fray of private fundraising during the last four weeks of a campaign.

It is no answer to suggest that Kentucky's goal is simply to encourage candidates to join the public subsidy program. For whether this is a permissible goal depends on *why* such participation is being encouraged. If the answer to that question is equalization of relative speaking power or reduction in campaign costs, then the goal is foreclosed by *Buckley*. If the answer is reduction of candidate dependence on private donors, then that goal is fully met by limitations on contribution amounts and full disclo-

sure rather than by a cap on aggregate levels of spending. In any event, Kentucky has available an obviously less restrictive alternative for encouraging participation in its public funding scheme: it may simply raise or eliminate spending limits on publicly funded candidates. This would also be a different case if the trigger lifted spending limits on participating candidates without awarding them additional public financial support.

For these reasons, this Court should grant review of and hold invalid Kentucky's trigger provision. While government is free to decline to finance a candidate who does not accept government spending ceilings, it is not free under the First Amendment to inundate that candidate with government-financed opposition or to give his opponent preferential fundraising opportunities the moment he raises or spends a dollar over that amount.[2]

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[2] The court of appeals found that the trigger provision lifts the 28-day window "for all slates," but this interpretation is inconsistent with the plain text of KRS § 121A.030(5)(a), which provides an exception to the pre-election contribution ban only for "[a] qualifying slate of candidates that has elected to become eligible for fund transfers." If the trigger were read to permit participating but not nonparticipating candidates to accept contributions during the last four weeks of an election, then such discrimination would furnish an independent issue warranting this Court's review. A number of states have sought to use differential contribution limits to induce participation in "voluntary" expenditure limits, and there already exists a conflict among the lower federal courts on whether such a practice is constitutional. *Compare VoteChoice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (upholding against First Amendment challenge a "cap gap" that permitted participants in a state campaign finance program to accept contributions higher in amount than nonparticipants could accept) *with California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998) (invalidating similar variable contribution limits on the ground that, if the higher limit for participating candidates suffices to combat corruption, then "the lower limit is not closely drawn," *id.* at 1296).

2. Whether a ban on outside contributions during the final four weeks of a political campaign conflicts with *Buckley* is an important question warranting this Court's review.

Banning political speech in the weeks immediately preceding an election is a little like banning cheering the closer the team gets to the goal; it would seem to miss the very point of the enterprise. Indeed, it would seem perverse from the standpoint of robust democratic discussion and debate to limit political speech at the very moment — the eve of an election — when the public is most likely to be politically alert, energized, and engaged.

This Court has recognized as much in cases such as *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which invalidated an early filing deadline for independent candidates as an excessive restriction on access to the ballot. Similarly, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court invalidated a durational residency requirement for voting, noting that voters are likeliest to inform themselves about an election during the period immediately preceding it: "Given modern communication, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the state and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections." *Id.* at 358. *See also Harman v. Forssenius*, 380 U.S. 528, 539 (1965) (noting that one objection to poll taxes was that they "usually had to be paid long before the election — at a time when political campaigns were still quiescent," penalizing those "voters who did not plan so far ahead"); *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating a prohibition on newspaper publication of editorials on election day urging people to vote in a particular way).

Nonetheless, Kentucky asserts that it must ban all outside contributions to gubernatorial candidates in the

twenty-eight days immediately preceding the election in order to tally whether a privately funded candidate has exceeded the trigger amount, and if so, to give participating candidates enough time to deploy a state-financed response. For this reason, the court of appeals found the window an "important part" of Kentucky's overall scheme "to limit the actuality and appearance of corruption." Pet. App. 18a. This conclusion was in error, and poses a conflict with *Buckley v. Valeo* that warrants this Court's review.

There can be little doubt that the window would be unconstitutional under *Buckley* if it were not ancillary to the trigger. To be sure, as the court of appeals noted, "the right of candidates to receive contributions" did not emerge "unfettered from the *Buckley* decision." Pet. App. 18a. But the contribution limit upheld in *Buckley* was a limitation on the amount, not the timing, of campaign contributions. The Court reasoned that a regulation forcing candidates to seek out a greater number of small donors would not necessarily limit the quantity of political speech, and that even if it did so, it was justified by the reduction in candidate dependence or apparent dependence on the political will of a few large donors. *See* 424 U.S. at 21-22, 26.

A restriction on the timing of contributions, in contrast, is both more restrictive of speech and association rights and less relevant to preventing corruption. A ban on contributions for the last month of an election does not merely channel the same quantity of speech into a different form, as this Court found in *Buckley* that contribution amount limitations do. Rather, a ban on contributions in the four weeks preceding an election limits the overall quantity of a candidate's speech, because it irrevocably forecloses him from obtaining contributions driven by late-breaking events and rising voter consciousness — for example, those contributions that would have been forthcoming only in response to an opponent's mounting negative attacks. Far from being a mere "time" restriction warranting deferential review, the contribution ban

"impose[s] direct quantity restrictions on political communication and association" and so warrants strictest scrutiny under *Buckley*. *Id.* at 18.

Even if the court of appeals were correct that a temporary contribution ban is no more restrictive than limitations on contribution amounts, some form of heightened scrutiny would apply nonetheless under *Buckley*, and Kentucky's month-long contribution cannot be justified under any standard of heightened review. The timing of a contribution, unlike the amount, bears no necessary or even probable relationship to the danger that the candidate will later act with undue favoritism toward a donor. Indeed, a candidate might well be more grateful to those who bankroll his campaign early than those who join in later. Kentucky might well assert that the danger of dependence on political contributions escalates in the desperate last days of a campaign, but it has adduced no empirical support for this proposition. In any event, such a theory is belied by the fact that the trigger provision allows publicly funded candidates to resume private contributions during that very time period. If private donations that are already limited in amount are not corrupting when the trigger is activated, it is difficult to see why they would be corrupting when it is not.[3]

Thus, Kentucky can defend the window only as an adjunct to the trigger, an argument that necessarily fails if the trigger itself is unconstitutional, as argued above. Because the trigger's penalty on nonparticipating candidates cannot be justified on the equalization or cost-containment grounds that *Buckley* foreclosed, and because that penalty bears no close relation to avoiding candidate corruption, the trigger must fall, and with it, the 28-day window.

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[3] If the trigger is read to permit only participating candidates to resume contributions during the final four weeks, then this discrimination against nonparticipating candidates furnishes independent grounds for this Court's review. See note 2 *supra*.

But even if the trigger were deemed constitutional, the 28-day window is far too sweeping to be sustained. The State has far less burdensome alternatives, such as requiring nonparticipating candidates to report to the State when they have exceeded the trigger amount so as to enable it to lift the restrictions on participating candidates. Shutting down a nonparticipating candidate's fundraising for the final month of a campaign is wholly unnecessary to ensure the State an opportunity to accord privileges to participating candidates.

Resolving whether Kentucky's 28-day window conflicts with *Buckley* is a matter of increasing importance as other states consider parallel campaign finance reforms. Accordingly, it warrants this Court's review.

CONCLUSION

For these reasons, petitioner respectfully requests that this Court grant the petition and issue a writ of certiorari to the court of appeals.

ROBERT ABELL
ACLU Cooperating Attorney
P.O. Box 983
Lexington, Kentucky 40588-0983
(606) 254-7076

KATHLEEN M. SULLIVAN
559 Nathan Abbot Way
Stanford, California 94305-8610
(650) 725-9875
Counsel of Record

DAVID A. FRIEDMAN
General Counsel
American Civil Liberties Union
of Kentucky
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 581-1181

Counsel for Petitioner

November 25, 1998

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1998 FED App. 0131P (6th Cir.)
File Name: 98a0131p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 96-6451/6475

ROBERT E. GABLE, - *Plaintiff-Appellant/Cross-Appellee,*

v.

PAUL E. PATTON, in his official capacity as Governor of the Commonwealth of Kentucky; A. B. CHANDLER, III, in his official capacity as Attorney General of the Commonwealth of Kentucky; KENTUCKY REGISTRY OF ELECTION FINANCE; DONALD L. COX, in his official capacity as Chair of the Kentucky Registry of Election Finance; MORRIS E. BURTON, in his official capacity as Franklin County Commonwealth Attorney; JAMES E. BOYD, in his official capacity as Franklin County Attorney; JOHN Y. BROWN, III, in his official capacity as Secretary of State for the Commonwealth of Kentucky, - - *Defendants-Appellees/Cross-Appellants.*

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort. No. 95-00012—Joseph M. Hood, District Judge.

Argued: December 2, 1997

OPINION—Decided and Filed April 30, 1998

Before: NORRIS, SUHRHEINRICH, and CUDAHY[1], Circuit Judges.

COUNSEL

ARGUED: Robert L. Abell, Lexington, Kentucky, for Appellant. Sheryl G. Snyder, BROWN, TODD & HEYBURN, Louisville, Kentucky, for Appellees. ON BRIEF: Robert L. Abell, Lexington, Kentucky, Edward E. Dove, Lexington, Kentucky, for Appellant. Sheryl G. Snyder, Susan S. Wettle, BROWN, TODD & HEYBURN, Louisville, Kentucky, Virginia H. Snell, WYATT, TARRANT & COMBS, Louisville, Kentucky, William B. Pettus, OFFICE OF THE ATTORNEY GENERAL, CIVIL & ENVIRONMENTAL LAW DIVISION, Frankfort, Kentucky, Jacquelyn P. Eckert, Louisville, Kentucky, John E. Kuhn, Jr., OFFICE OF THE U.S. ATTORNEY, Louisville, Kentucky, for Appellees. Dennis M. Flannery, WILMER, CUTLER & PICKERING, Washington, D.C., Richard V. Beliles, Prospect, Kentucky, for Amicus Curiae.

SUHRHEINRICH, J., delivered the opinion of the court, in which NORRIS, J., joined. CUDAHY, J. (pp. 25-27), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SUHRHEINRICH, Circuit Judge. Plaintiff Robert E. Gable, a candidate for governor in Kentucky's 1995 Republican primary, brought suit challenging numerous provisions of Kentucky's campaign finance and election laws on First Amendment grounds. Several of the provisions involve Kentucky's optional public funding scheme, in which Plaintiff chose not to participate. Defendants include various state and county officials, as well as the Kentucky

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[1] The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Registry of Election Finance (hereinafter Registry), the state agency charged with enforcing campaign finance laws. The district court granted summary judgment for Defendants, except with regard to one aspect of one statutory provision, for which summary judgment was granted for Plaintiff. Plaintiff's appeal involves four of the provisions ruled on by the court. Defendants' cross-appeal challenges the one issue that was decided in Plaintiff's favor. We AFFIRM the district court's decision in all respects.

I. Provisions Challenged On Appeal

This appeal and cross-appeal challenges the district court's decision with regard to four provisions of Kentucky's campaign finance and election laws. These four provisions include:

(1) Ky. Rev. Stat. § 121.190(1) (hereinafter the Sponsor Identification provision), which requires that all advertisements advocating the election of a particular candidate contain identification of the sponsor. This provision explicitly includes "posters," "circulars," and "handbills," and it this aspect of the provision which Plaintiff challenges.[2]

(2) Ky. Rev. Stat. § 118.127 (hereinafter the Slating provision), which requires candidates for governor and lieutenant governor to run in their party's primary as part of a

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[2] The Sponsor Identification provision applies to "[a]ll newspaper or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates for nomination or election to any public office." Ky. Rev. Stat. § 121.190(1). The required identification consists of "the words 'paid for by' followed by the name and address of the individual or committee which paid for the communication; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words 'paid for by' followed by the name." *Id.*

single slate, rather than running individually.[3]

(3) Ky. Rev. Stat. § 121A.030(5) (hereinafter the 28-Day Window), which prohibits all gubernatorial candidate slates, including those electing not to participate in public funding (hereinafter non-participating slates), from accepting contributions during the twenty-eight days preceding a primary or general election.[4] This prohibition applies to candidates' contributions to their own campaigns, as well as to contributions from outside sources. The 28-Day Window does not affect funds which are already in the slate's campaign account at the beginning of the 28-day period.

(4) Ky. Rev. Stat. § 121A.030(5)(a) (hereinafter the Trigger), which affects the $1.8 million campaign spending limit. *Id.* § 121A.030(1). The limit applies separately to the primary and general elections and affects only those slates which elect to participate in public funding (hereinafter participating slates). When a non-participating slate collects more than $1.8 million in campaign funds in a primary or general election, including contributions from the candidates themselves, the Trigger is activated.[5] The result is that the $1.8 million spending limit for participating slates is lifted, and the 28-Day Window is lifted for all slates. Before the Trigger is activated, participating slates may raise up to $600,000, *id.* § 121A.060(1), which, when combined with two-for-one matching public funds, *id.* § 121A.060(3)(c), results in campaign funds of up to $1.8 million. After the Trigger is activated, a participating slate

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[3] Plaintiff's challenge to the Slating requirement cites Ky. Rev. Stat. §§ 118.125 and 118.127 in tandem, but § 118.125 is only tangentially related to the requirement.

[4] Prior to a 1996 amendment to the statute, the window was thirty days long instead of twenty eight. A fourteen-day window applies to primary *runoff* elections.

[5] In a primary *runoff* election, a $300,000 ceiling and triggering threshold is substituted for the $1.8 million figures. Ky. Rev. Stat. § 121A.030(1).

may raise an unlimited amount of money, all of which is matched by the two-for-one public funding.[6]

The district court granted summary judgment with respect to all four provisions above. It held the 28-Day Window to be unconstitutional with regard to non-participating candidates contributing to their own campaigns, and that decision is contested in Defendants' cross-appeal. In all other respects, the four provisions were found to be constitutional, forming the basis for Plaintiff's appeal. Because the four provisions are challenged with regard to facial constitutionality, thus implicating only issues of law, neither Plaintiff nor Defendants contest the appropriateness of summary judgment. For the same reason, our standard of review is de novo. *See Kentucky Right To Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir.), *cert denied*, 118 S.Ct. 162 (1997). Under that standard, we AFFIRM the district court's decision with respect to each of the four provisions challenged on appeal.

II. The Sponsor Identification Provision

The Sponsor Identification provision, Ky. Rev. Stat. § 121.190(1), requires that advertisements supporting a particular candidate contain identification of the sponsor. Defendants maintain that this provision provides an essential means of detecting violations of various contribution and spending limits in Kentucky's campaign finance scheme. Plaintiff claims that the provision violates his First Amendment right to free speech, inasmuch as it prohibits *anonymous* handbills, posters, circulars, and the like.

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[6] A participating slate is not eligible for matching funds until 1) it has raised at least $300,000, Ky. Rev. Stat. § 121A.060(1), and 2) an opposing slate (whether participating or not) has raised at least $300,000. *Id.* § 121A.060(13). The latter provision is intended to prevent the use of public funds in uncontested elections.

He argues that 1) these forms of communication involve expenditures too modest to implicate a compelling state interest, and 2) without a compelling state interest, the burden on First Amendment freedoms imposed by the Sponsor Identification provision cannot survive constitutional scrutiny. In particular, Plaintiff points to Kentucky's requirement that anyone making *more than* $500 in independent expenditures on behalf of candidates in a single election must report the expenditures to the Registry. *Id.* §§ 121.150(1), 121A.010(13). Plaintiff argues that this threshold represents the state's judgment that modest expenditures of less than $500 are too small for the state to assert a compelling interest in regulating them.

The district court initially enjoined enforcement of the Sponsor Identification provision, but ultimately upheld it as constitutional. The court found that although the provision infringes on First Amendment rights, it survives strict scrutiny, because it is narrowly tailored to meet the state's compelling interest in enforcing its campaign finance laws and thereby combating corruption.

After the notices of appeal and cross-appeal had been filed in this case, we upheld the Sponsor Identification provision in *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert denied*, 118 S.Ct. 162 (1997). This court's reasoning in *Kentucky Right To Life* was similar to that of the district court in the instant case. We conceded that the Sponsor Identification provision "clearly implicates First Amendment protection because it burdens core political speech [and thus] it must be narrowly tailored to serve an overriding state interest." *Id.* at 648 (citation and internal quotation marks omitted). However, we held that the provision is constitutional because it is narrowly tailored toward achieving two "substantial governmental interests," namely (1) it "prevents actual and perceived corruption by immediately notifying the public of any possible allegiance a particular candidate may feel toward the publisher," and (2) it "provides the Registry with a method of detecting those expenditures which are not truly indepen-

dent." *Id.*[7]

Plaintiff introduces an argument not raised in *Kentucky Right To Life*, namely that sponsor identification cannot be constitutionally required on handbills, posters, circulars, and the like. While *Kentucky Right To Life* does not foreclose an as-applied constitutional challenge by someone convicted of distributing a small number of anonymous circulars, Plaintiff's challenge to the constitutionality of the Sponsor Identification provision is facial. Plaintiff's introduction of a new legal argument does not provide a basis for us to distinguish the instant case from *Kentucky Right To Life*, which did not make any distinctions regarding the type of advertisement or amount of money expended. As *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985), explained, "[a] panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." Neither of these conditions have occurred. Therefore, we affirm the district court's holding that the Sponsor Identification provision is constitutional.

III. The Slating Provision

The Slating provision, Ky. Rev. Stat. § 118.127, requires candidates for governor and lieutenant governor to run in their party's primary as part of a single slate. The district court held the provision to be constitutional, rejecting Plaintiff's claim that it violates his First Amendment right to freedom of association. Plaintiff argues that the

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[7] Detection of expenditures which are not truly independent is important, because money spent on a genuine "independent expenditure," *see* Ky. Rev. Stat. § 121A.010(13), is not counted as a contribution under other provisions of Kentucky's campaign finance laws, e.g., the 28-Day Window and the $1.8 million ceiling.

Slating provision dictates the terms of his association with his chosen political party, both in his capacity as a member and as a candidate in the party's primary. In sum, Plaintiff contends that the provision dictates to him and his party "how they may perform one of their most integral functions: selection of their general election candidates."

A. Standing

As a preliminary matter, we must consider whether Plaintiff has standing to challenge the Slating provision, an issue not addressed by the district court. Defendants contend that Plaintiff does not have standing, because he does not have the perogative to decide how his party's candidates will be selected. The "associational rights that he identifies are not his personally, but are those only of the Republican Party," Defendants argue. They add that, even if this court were to confer *jus tertii* standing on Plaintiff, he could not assert the rights of an unincorporated association like his party, because he did not plead the claim as a class action.

Plaintiff argues that he has standing to make the freedom of association claim based on 1) his participation in candidate selection as a party member, and 2) his candidacy in the party's primary. We conclude that Plaintiff's argument is correct, at least with regard to his status as a party member. The Supreme Court has repeatedly stated that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 US 234, 250 (1957); *accord Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986); *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981); *see also* Julia E. Guttman, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 117 n.3 (1984) ("In the past, when a political party has brought suit, it has alleged an infringement of the rights of its members. Thus, when a political party can sue, any party member could also sue.").

B. Substantive Issues

Defendants argue that, even if Plaintiff does have standing to challenge the Slating provision, the challenge must fail because 1) the provision merely regulates Plaintiff's access to the ballot, without affecting his freedom of association, and 2) the provision is supported by a compelling state interest in preventing "factionalism," i.e., dissension between the governor and lieutenant governor. The district court used similar reasoning in upholding the Slating provision. It found that "Gable may be as free in his political association as he chooses," because the provision does not restrict Gable's choice of a running mate for his slate. The court conceded that the provision did burden Gable's right to access the ballot, but concluded that even that burden was slight. Finally, the court found that "[i]t is undisputed that Kentucky's interest in preventing factionalism and in stabilizing government are recognized as compelling. . . . [This interest was] born of years of attempting to cope with factionalism in the gubernatorial race."

The district court found that evaluation of the constitutionality of the Slating provision was governed by the standard set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). We agree. Although *Anderson* struck down Ohio's early filing deadline for independent presidential candidates, finding it to be an unconstitutional burden on the voting and associational rights of the candidates' supporters, the Court stated that:

> [A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. . . . Each provision of these [regulations], whether it governs the registration and qualifications of voters, the *selection and eligibility of candidates*, or the voting process itself, inevitably affects — at least to some degree — the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's

> important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Id. at 788 (emphasis added) (citation and internal quotation marks omitted). Like the district court, we find the Slating provision to be just such a reasonable, nondiscriminatory restriction. As a matter of fact, the burden this provision places on Plaintiff appears relatively small compared to the example in *Anderson* of a reasonable, nondiscriminatory ballot access restriction. That example involved a state "requir[ing] candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Id.* at 788 n.9.

The modest burden placed on Plaintiff's "right to associate with others for political ends" is clearly justified by "the State's important regulatory interests." *Id.* at 788. *Storer v. Brown*, 415 U.S. 724 (1974), noted that "the Founding Fathers [believed] that splintered parties and unrestrained factionalism may do significant damage to the fabric of government," *id.* at 736, leading the Court to conclude that "the State's interest in the stability of its political system [is] not only permissible, but compelling." *Id.* While Plaintiff contends that Kentucky's proffered interest in ameliorating factionalism is "nothing more than a claim of right to assure the ideological compatibility of a party's general election candidates," this is not so much an argument as it is a pejorative rephrasing of what the Supreme Court has held to be a compelling state interest. Because the state's compelling interest clearly outweighs the modest burden on Plaintiff's constitutional rights, we affirm the district court's holding that the Slating provision is constitutional.

IV. The Trigger Provision

The Trigger, Ky. Rev. Stat. § 121A.030(5)(a), is a mechanism whereby, when a non-participating slate collects more than $1.8 million in campaign funds in a primary or general election, the $1.8 million ceiling is lifted for participating slates, and the 28-Day Window is lifted for all slates.

Defendants maintain that the Trigger provision is designed to encourage candidates to participate in Kentucky's campaign finance scheme, including its $1.8 million expenditure limit. They argue that the Trigger must be a part of that scheme "[i]n order to assuage the wholly legitimate fears of participating slates" that they will be "vastly outspent due to their agreement to accept spending limits." Defendants contend that the overall scheme serves a compelling state interest in minimizing the role of fundraising and "combat[ing] corruption by ending the money chase that has undermined the integrity of politicians and the faith of the public in the political process."

Plaintiff contends that the Trigger provision violates his First Amendment right to free speech. The crux of his claim is that the effect of the Trigger is to coerce him into limiting his campaign spending to $1.8 million, thereby forgoing protected speech. The alleged coercion flows from the fact that, if he exceeds the $1.8 million threshold by any amount, his campaign will potentially be "inundated" by the spending of participating slates, which will not only be released from their ceiling, but will continue to get unlimited two-for-one matching public funds. Put another way, Plaintiff asserts that there is a high "penalty" for his 1.8 millionth dollar of speech.

The district court held the Trigger provision to be constitutional, rejecting what it called a "benefit equals burden" argument predicated on the notion that benefits provided to participating slates by activation of the Trigger represent a penalty on Plaintiff's speech. However, the court conceded that "[t]here is no question but that the trigger provision . . . restricts free political speech. . . . [S]peech will be stifled to some degree by the fear that the participating candidate will clearly 'outspend' the non-participating candidate once the cap is lifted, given the additional '2 to 1' funding." However, the court upheld the Trigger because "the state has a compelling interest in keeping campaign expenditures at levels that do not encourage actual or apparent corruption of the political pro-

cess, i.e., to keep one candidate from essentially buying a campaign."[8]

To the extent that the district court relied upon Kentucky's interest in preventing candidates from buying victory, it erred in light of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding and striking down various portions of the Federal Election Campaign Act and related provisions), the seminal campaign finance case which "provides the constitutional framework for analyzing First Amendment challenges to campaign contribution regulations." *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d 637, 647 (6th Cir.), *cert denied*, 118 S.Ct. 162 (1997). The *Buckley* Court held that the "interest in equalizing the relative financial resources of candidates . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights." *Buckley*, 424 U.S. at 54. However, "[t]he Supreme Court has consistently held that preventing perceived corruption is a compelling state interest." *Kentucky Right To Life*, 108 F.3d at 650-51. Hence, the district court has identified a state interest which can potentially justify the burden on Plaintiff's First Amendment rights.

We turn now to analyzing the extent of the burden on Plaintiff's First Amendment rights. In general, the public funding of candidates in return for their acceptance of expenditure limits is constitutional, *Buckley*, 424 U.S. at 57 n.65, despite the potential for pressuring candidates into accepting the expenditure limits. However, as the district

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[8] Similar reasoning was used in *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995), which also upheld Kentucky's Trigger provision. That court stated that even if "the trigger provision chills speech to some degree, we find that it is a narrowly tailored means which addresses a compelling state interest . . . in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption." *Id.* at 928.

court succinctly stated, "although a statutorily created benefit does not per se result in an unconstitutional burden, such benefits could conceivably 'snowball' into a 'coercive' measure upon a non-participating candidate." *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("[T]here is a point at which [public financing] incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996) ("[T]he State's public financing package does not . . . create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns."); *Wilkinson v. Jones*, 876 F.Supp. 916, 929 (W.D. Ky. 1995).

The district court gave an example of such coercion, stating that if Kentucky provided four dollars in matching funds, instead of the current two dollars, for every dollar raised by participating candidates, a non-participating candidate would have no way of remaining competitive once the $1.8 million ceiling was lifted. As a result, the court said, "the candidate would have no real choice but to participate in the scheme," making it unconstitutional. The doctrine that benefits provided to participating candidates can become unconstitutionally coercive, if they are overwhelming enough, follows logically from the holding in *Buckley* that involuntary limits on a candidate's campaign expenditures are unconstitutional. *See Buckley*, 424 U.S. at 58. This holding would be rendered meaningless if the government could effectively force a candidate into accepting expenditure limits by providing overwhelming benefits to participating candidates.

Thus, the central question we are faced with is whether the substantial advantage the Trigger provides to participating candidates rises to the level of unconstitutional coercion. At the very least, the Trigger provision can be said to provide very strong incentives for participation in Kentucky's campaign finance scheme. Because of the Trigger, a non-participating candidate derives no relative advantage from the $1.8 million spending limit on his par-

ticipating opponents. Yet, because his participating opponents receive two-for-one public funding, resulting in three dollars spent for every one dollar raised, there is a substantial cost for non-participation. Given the lack of balance between costs and advantages, there is only a narrow set of circumstances under which a candidate could make a financially rational decision not to participate. That situation is where the non-participating candidate intends to exceed the $1.8 million threshold and believes he will raise more than three times the funds his participating opponents can raise.

In this respect, the Trigger is certainly more coercive than the federal campaign finance scheme for presidential elections. Under that scheme, 26 U.S.C. §§ 9001-9042, candidates who accept an expenditure ceiling in return for public funding are not released from the ceiling regardless of how much their non-participating opponents spend. The federal scheme was upheld in *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F.Supp. 280, 283-88 (S.D. N.Y. 1980) (3-judge court), which was affirmed without comment by the Supreme Court, 445 U.S. 955 (1980). However, the Court has not provided any guidance as to how much farther a campaign finance scheme can go in providing incentives for participation before it crosses the line and becomes unconstitutionally coercive.

The lower courts do not provide much guidance either, as there is little case law that is truly on point. However, the Eighth Circuit did uphold a provision of Minnesota's campaign finance law, which in some respects, goes further than the Trigger in strongly discouraging non-participation. *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). Like the Kentucky scheme, Minnesota's law permits publicly financed candidates to exceed an expenditure ceiling when their non-participating opponents raise funds in excess of a certain triggering amount. *Id.* at 1547. Minnesota's trigger provides a bigger advantage to participating candidates than does Kentucky's, because the triggering amount in Minnesota is less than the ceiling. *Id.*

However, in other respects, the Minnesota scheme does not go as far as Kentucky's, because the public funding does not continue unabated after the ceiling is lifted. Instead, the amount of public funds a candidate may receive is limited to fifty percent of the ceiling amount. *Id.* at 1546.

Returning to Kentucky's scheme, it is clear that candidates are under financial pressure to participate, since participation will be the rational choice in the large majority of cases. However, a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice. Were we to conclude that the incentives provided by Kentucky are unconstitutional, we would be making a distinction based on degree. In that sense, *Buckley* does provide some guidance. In upholding a one thousand dollar limit on campaign contributions by individuals, the Court stated that if "some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30 (citation and internal quotation marks omitted). We believe the same principle applies here. Absent a clearer form of coercion, we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives. Faced with a difference only in degree, we will not second guess the Kentucky legislature by applying a "scalpel" and declaring that Kentucky's scheme goes one step over the line of unconstitutional coercion, especially where, as here, the line is not a clear one. Therefore, we affirm the district court and hold that Kentucky's Trigger provision is constitutional.

V. The 28-Day Window

The 28-Day Window, Ky. Rev. Stat. § 121A.030(5), prohibits all gubernatorial candidate slates from accepting contributions or contributing to their own campaigns during

the twenty-eight days preceding a primary or general election. However, any money already in the slate's campaign account can be spent during this period. While it is clear that Kentucky can impose this prohibition on candidates who voluntarily participate in the state's public funding scheme, *see Buckley*, 424 U.S. at 57 n.65 ("Congress may . . . condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."), the constitutionality of the prohibition on non-participating candidates is in question. Plaintiff, a non-participating candidate, contends that the 28-Day Window violates his First Amendment right to free speech, by limiting his political expression during the last twenty-eight days of a campaign. He argues that the Window violates his right to free association as well, because it interferes with his relationship with his contributors.

Defendants respond that the 28-Day Window is required in order to effectuate the Trigger, Ky. Rev. Stat. § 121A.030(5)(a), which, they claim, is an indispensable part of Kentucky's entire public funding scheme. Defendants maintain that the purpose of the 28-Day Window is to ensure that all contributions (including those to a candidate's own campaign) are made before the final pre-election reporting date, so that, if a non-participating slate has exceeded the $1.8 million threshold, the Registry can detect it in time to activate the Trigger. Moreover, Defendants argue, the Trigger must be activated long enough before the election to allow participating slates a meaningful amount of time to solicit additional contributions.

The district court held the 28-Day Window to be constitutional with regard to contributions from outside sources (hereinafter *external contributions*), but held it to be unconstitutional with respect to non-participating candidates contributing to their own campaigns (hereinafter *internal expenditures*). Plaintiff challenges the court's decision on external contributions, while Defendants challenge the decision on internal expenditures. The key for analyzing both issues is *Buckley* and its holdings on provisions of the

Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by 88 Stat. 1263 (1974) (hereinafter the Federal Act). Two of those holdings are particularly important here. One, the *Buckley* Court upheld the Federal Act's limits on the amount of money that an individual or group could contribute to a candidate for federal office. *Buckley*, 424 U.S. at 23-36. Two, the Court struck down, as unconstitutional, the Act's limits on a candidate's expenditure of his own money. *Id.* at 51-54. Subsection A below analyzes the 28-Day Window with respect to external contributions, while subsection B looks at internal expenditures.

A. External Contributions

Although the district court devoted three pages to discussing the constitutionality of the 28-Day Window with respect to internal expenditures, it devoted only one sentence to the issue of external contributions. Specifically, the court said that "*Buckley* legitimatizes limiting contributions from other sources during the reporting period." The district court is evidently referring to the holding in *Buckley* that the Federal Act's limits on the size of external contributions is constitutional. While *Buckley* found that these limits did burden free speech and free association to some extent, 424 U.S. at 20-23, it also found that the burdens were justified.[9] The *Buckley* Court concluded that "[i]t is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification." *Id.* at 26.

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[9] *Buckley* stated that the limits "impinge on protected associational freedoms [because] [m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. Although the Supreme Court was discussing the associational rights of contributors, the same argument can be made for Plaintiff's right to affiliate and pool resources with contributors.

We accept Defendants' contention that the purpose of Kentucky's campaign finance scheme is also to limit the actuality and appearance of corruption, and that the 28-Day Window is an important part of that scheme. However, we disagree with the district court that *Buckley* is so clearly controlling that no further analysis is necessary. One reason for our disagreement is that *Buckley* addressed the First Amendment rights of *contributors*, whereas the instant case involves the right of a *candidate* to receive contributions. Another reason is that *Buckley* relied on "[t]he major evil . . . [being] the danger of candidate dependence on *large* contributions," *id.* at 55 (emphasis added), whereas the 28-Day Window makes no distinction based on contribution size. Consider the following conclusion by the *Buckley* Court:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . The quantity of communication by the contributor does not increase perceptibly with the size of his contribution.

Id. at 20-21. That reasoning simply has no relevance in the instant case.

Thus, the application of *Buckley* to the instant case is far from straightforward. Nonetheless, we would be ignoring the obvious if we maintained that the right of candidates to receive contributions emerged unfettered from the *Buckley* decision. The *Buckley* Court gave no indication that its decision would have been different had the right of candidates to receive contributions been asserted. To the contrary, *Buckley* sanctioned the fact that the Federal Act would force candidates to rearrange their fundraising by seeking out many small donors, instead of a few large ones. *Id.* at 21-22 ("The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons."). The effect of the 28-Day Window with respect to external contributions is similar. Candidates will be forced

to rearrange their fundraising by concentrating it in the period before the 28-Day Window begins. That is not a trivial restriction, but we read *Buckley* to say that such a restriction is justified by Kentucky's interest in combating corruption. We, therefore, affirm the district court's holding that the 28-Day Window is constitutional with respect to external contributions.

B. Internal Expenditures

In striking down the 28-Day Window with respect to internal expenditures, the district court relied on *Buckley* to conclude that "[t]here can be no doubt that a candidate cannot be restricted from contributing to and spending for his own candidacy." We essentially agree. The question of whether Kentucky can extend the 28-Day Window to internal expenditures by non-participating candidates is largely answered by the Supreme Court's clear statement that "the First Amendment simply cannot tolerate [the Federal Act's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54; *see Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S.Ct. 2309, 2321 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) ("The central holding in [*Buckley*] is that spending money on one's own speech must be permitted.").

The *Buckley* Court reached this conclusion primarily for two reasons. One, it found that "the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations." *Buckley*, 424 U.S. at 44.[10] Two, the Court found that "[t]he

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[10] In addition to limiting the amount a candidate could spend on his own campaign, the Federal Act 1) imposed a ceiling on overall expenditures by a candidate, and 2) limited the size of independent expenditures, i.e., those made "relative to a clearly identified candidate," but not authorized or requested by the candidate. *Buckley*, 424 U.S. at 39. All of these expenditure limitations were held to be unconstitutional in *Buckley*. *Id.* at 58.

primary governmental interest [of preventing] actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds," *id.* at 53, because a candidate cannot become beholden to himself. Indeed, as the Court pointed out, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." *Id.* The corruption-related interest cited by *Buckley* remains "the only legitimate and compelling government interest[] thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

Because "[t]he central holding in [*Buckley*] is that spending money on one's own speech must be permitted," *Colorado Republican Comm.*, 116 S.Ct. at 2321 (Kennedy, J., concurring in the judgment and dissenting in part), there is little room for Defendants to maneuver in attempting to show that the 28-Day Window can be constitutionally applied to internal expenditures. Nonetheless, we consider one possible distinction between the 28-Day Window and the internal expenditure provisions struck down in *Buckley*. Although *Buckley* pointed out that a candidate's use of his own money does not lead to corruption, Kentucky's interest in preventing actual and apparent corruption is served by the 28-Day Window's application to internal expenditures, albeit indirectly. Extension of the 28-Day Window to internal expenditures increases the effectiveness of the Window, which increases the effectiveness of the Trigger, which, in turn, strengthens the incentives for participating in Kentucky's campaign finance scheme, a scheme which is clearly aimed at the prevention of actual and apparent corruption. However, we ultimately must conclude that a distinction based on this reasoning cannot rescue the constitutionality of the 28-Day Window's application to internal expenditures.

We reach that conclusion for several reasons. One, *Buckley* relies more on the extent of the First Amendment burden imposed by expenditure limits than it does on the weight of governmental interests. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 29 n.2 (1986) (Rehnquist, J., dissenting) ("[T]he critical distinction [in *Buckley*] between the contribution and expenditure limitations [is] not the relative worth of the respective governmental interests," but instead is the fact that expenditure "limits 'impose far greater restraints on the freedom of speech and association.'") (quoting *Buckley*, 424 U.S. at 44). Two, *Buckley* stated that "[t]he markedly greater burden on basic freedoms caused by [the limit on independent expenditures] cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 44. Similarly, we reject the argument that the greater burden imposed by the 28-Day Window's extension to internal expenditures can be justified by its impact on the effectiveness of the less intrusive Trigger provision. Three, the marginal increase in the effectiveness of the Trigger that is gained by extending the 28-Day Window to internal expenditures is obviously aimed at wealthy candidates. Indeed, Defendants argue that the extension "ensures that a candidate who is extremely wealthy will not be able to 'buy the election' with unfettered and unopposed campaign power in the final days before votes are cast." Because the marginal increase is aimed at wealthy candidates, it provides an insufficient justification. *Buckley* found that the "interest in equalizing the relative financial resources of candidates . . . is clearly not sufficient to justify the [internal expenditure] provision's infringement of fundamental First Amendment rights." *Id.* at 54.

Defendants suggest another possible way to distinguish the 28-Day Window from the internal expenditure provision struck down in *Buckley*. They argue that the Window restricts contributions but not expenditures, because a gu-

bernatorial candidate can spend as much of his personal funds as he wants during the 28-day period, as long as the money is already deposited in his slate's campaign account when the period begins. Though candidates are prohibited from contributing to their own accounts in the last twenty-eight days, Defendants maintain that the act of contributing to one's own account does not involve any expression. This distinction, too, must fail for a number of reasons.

To begin with, it is erroneous for Defendants to argue that contributions but not expenditures are prohibited in the last twenty-eight days. If a candidate were to desire, during those twenty-eight days, to spend additional amounts of his own money on the campaign, Defendants' argument would dismiss the additional money as merely a contribution, which could be prohibited. However, *Buckley* explicitly rejected a lower court's attempt to characterize "the personal funds expended by the candidate on his own behalf as a contribution rather than an expenditure." *Buckley*, 424 U.S. at 52 n.58.

Defendants attempt to portray the requirement that a candidate deposit his personal funds in the campaign account before the twenty-eight days begin as little more than a financial technicality. However, it is much more than that, because it forces a candidate to decide in advance how much of his own money he will spend, before he has a chance to assess the public opinion polls and actions of his opponents in the last month of the campaign. Moreover, it would simply not be feasible for a candidate to deposit virtually all of his personal resources in the campaign account in advance, just in case he decides, during the last twenty-eight days, to spend those resources on his campaign. First, it is unlikely that all of the candidate's personal resources will be liquid. Second, the mere deposit of his personal funds counts towards activating the Trigger. Third, the candidate cannot easily take back his money

if it is unexpended at the end of the campaign.[11] In sum, it is disingenuous for Defendants to argue that the 28-Day Window does not burden a candidate's ability to spend personal funds on his own campaign.

Finally, Defendants attempt to distinguish the 28-Day Window from the provision struck down in *Buckley* by characterizing it as "merely a time, place and manner restriction." *Buckley* acknowledged that "the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." *Buckley*, 424 U.S. at 18. However, the *Buckley* Court went on to conclude that the Federal Act's expenditure limits, and even its external contribution limits, do not fall into that category, because they "impose direct *quantity* restrictions on political communication and association." *Id.* (emphasis added). In the previous paragraph, we discussed the effects of prohibiting a candidate from contributing to his own campaign in the final month. Because the effects are substantial, rather than just being a matter of timing, we agree with the district court that "[i]t cannot be seriously argued that the prohibition at issue does not restrict the *quantity* of political speech" (emphasis added). Therefore, for the same reason cited by *Buckley*, the 28-Day Window

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[11] Under Ky. Rev. Stat. § 121.180(10), the unexpended funds in the campaign account of a participating slate shall "escheat to the State Treasury, be returned pro rata to all contributors, . . . be transferred to the state or county executive committee of the political party of which the candidate is a member except that a candidate . . . may retain the funds to . . . seek election to the same office or may donate the funds to any charitable, nonprofit, or educational institution." Candidates cannot get around this provision by making large loans to their campaigns. *See id.* § 121.150(13) ("No candidates running as a slate . . . shall make combined total personal loans to their committee in excess of fifty thousand dollars.").

cannot be characterized as a mere time, place and manner restriction.

While we are sympathetic to the administrative goals of the 28-Day Window, we cannot distinguish it from the internal expenditure provision struck down in *Buckley*. Thus, we are bound by the Supreme Court's clear statement that "the First Amendment simply cannot tolerate" this type of restriction on the freedom of a candidate to speak on his own behalf. *Buckley*, 424 U.S. at 54. Accordingly, we affirm the district court's holding that the 28-Day Window is unconstitutional when it prohibits a non-participating candidate from contributing to his own campaign.

VI. Conclusion

We hold that Kentucky's Sponsor Identification provision, Ky. Rev. Stat. § 121.190(1), Slating requirement, *id.* § 118.127, and Trigger provision, *id.* § 121A.030(5)(a), are all constitutional. We further hold that the 28-Day Window, *id.* § 121A.030(5), is constitutional with respect to contributions from external sources. However, we hold that the 28-Day Window is unconstitutional when it prohibits a non-participating candidate from contributing to his own campaign. Thus, we AFFIRM the district court's decision in all respects.

CONCURRING IN PART, DISSENTING IN PART

CUDAHY, Circuit Judge, concurring in part and dissenting in part.

I concur in all of the cogent majority opinion except Part V.B., which invalidates the 28-Day Window insofar as it prohibits candidates from contributing to their own campaigns during the final weeks before an election. As the majority explains, Kentucky's campaign finance system is designed to combat actual and apparent corruption. The 28-Day Window does not merely "indirectly" advance this goal as the majority suggests; instead the Window is crucial to the effectiveness of the entire Kentucky scheme and its invalidation threatens to derail this reform effort. The

28-Day Window is intended to preclude participating and non-participating candidates from infusing last-minute cash into their campaign coffers, too late to be reported and to allow a response by their opponents. The majority has approved this 28-Day Window to the extent that it limits contributions by supporters. But as a result of the majority's disallowance of the same limitation on self-financing, a candidate using his own funds will now be free to ambush an adversary with a torrent of new cash after the last reporting deadline, when a response is no longer possible. A provision that forbids this unfair practice should not require a defense.

To justify its result, the majority is not, as it claims, merely applying *Buckley v. Valeo*, 424 U.S. 1 (1976). Instead, the majority is extending that case in a fashion that *Buckley* specifically forecloses. As the majority concedes, *Buckley* authorizes "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication," provided that the regulations do not impose "*direct* quantity restrictions on political communication and association." 424 U.S. at 18 (emphasis added).

Here the purpose and effect of the 28-Day Window is to prohibit contributions at a highly sensitive time—within a few weeks or days of the election and after the last financial report has been made. Since this is the end of the campaign, total contributions *might* be less than if there were no such restrictions. But the prohibition applies directly and explicitly to *when* contributions are made; there is no impact on amount unless, without the restriction, a candidate decided on a last-minute contribution. Whether a candidate would make such a contribution is a matter of conjecture. *Compare id.* at 19 ("The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."). The provision before us therefore does not impose "direct quantity restrictions" and is not a violation of the *Buckley* principle.

Nor does the 28-Day Window involve the evil at which *Buckley* was aimed. *Buckley* was concerned that a candidate not be prohibited from contributing to, and spending money on, her own candidacy. *See id.* at 52-53. Certainly that freedom is not at stake here. Candidates are free to make contributions, as frequently as they wish and of whatever magnitude they choose, before the advent of the 28-Day Window. The majority makes a number of unconvincing arguments about why this freedom fails to satisfy the requirements of the First Amendment. In particular, the majority has advanced the strawman that a candidate might need to "deposit virtually all of his personal resources" before the 28-day limit in the expectation of trouble to come. The reality would be simply that the candidate would put up something before the 28-Day Window (that she would be required to report) as a hedge against last-minute difficulties. If the difficulties did not materialize, it is likely that regular campaign expenses could absorb the surplus. In any event, if there were no last-minute problems requiring additional cash, the candidate's campaign no doubt went well, and she would be untroubled by any surplus.

All the 28-Day Window provides is *notice* that the contribution has been made and an opportunity for the opponent to respond. The provision thereby removes the unfairness of last-minute, unreported contributions. It is true that *Buckley* prohibits "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Id.* at 48-49. But that does not mean that the First Amendment protects the right to ambush an opponent. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) ("If appellee's arguments were supported by . . . findings that . . . advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.") (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)). Nor do I believe that denying such a right would result, as the majority contends, in only a "marginal" increase in the effec-

tiveness of the Trigger. The majority's logic here is not transparent. It may be saying that, since the application of the 28-Day Window is aimed at wealthy candidates, the effect is only marginal and cannot be a basis for disregarding *Buckley*'s injunction against attempting to equalize the financial resources of candidates. I am not sure how we can conclude that the effect of a last-minute cash infusion into a campaign that could be won by a single vote is only "marginal." However, if this is so, by the same token its prohibition cannot be a significant infringement of the First Amendment.

In sum, the majority is troubled that the 28-Day Window is a "burden" on a candidate's freedom to speak with her own dollars. But the alternative is to construct a special right to speak with unreported dollars at the last minute when no response is possible. I do not believe that the First Amendment requires such a perverse construction, and I therefore respectfully dissent with respect to this issue.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 95-12

ROBERT E. GABLE, Et Al. - - - - - *Plaintiffs.*

v.

BRERETON C. JONES, Et Al., - - - *Defendants.*

MEMORANDUM OPINION AND ORDER—
Filed March 29, 1996

The parties, by and through counsel, having moved for summary judgment [Record Nos. 68, 71, 73, 75 & 79], and the Court having considered the parties' briefs, and argument of counsel, this matter is ripe for decision.

PROCEDURAL BACKGROUND

The plaintiffs filed the instant action on February 17, 1995, seeking a declaration of the constitutionality of various statutes under Kentucky's Campaign Finance Reform Law. As the basis of the Court's jurisdiction over this matter and a sufficient statement of the factual background have been set out in the Court's partial declaratory judgment order, a recitation of those facts is not necessary here.

The parties' motions for summary judgment address each of the 22 claims in the plaintiffs' amended complaint. However, Counts III, V, VII, VIII, X, XII, XIII, XIV, XV, XVIII, XX have been dismissed.[1] Accordingly, the Court

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[1] As the claims forwarding allegations asserted by the plaintiff, Darryl Sebastian [Sebastian], have been dismissed, the Court must dismiss Sebastian as a party to this action and will therefore refer to the plaintiff, Robert Gable [Gable], in the singular.

will address only the remaining claims, as well as revisit Gable's claim in regard to KRS 121.190.

DISCUSSION

I. Count I — KRS 118.125 and 118.127

KRS 118.125 and 118.127 were implemented by the legislature to give effect to a Kentucky constitutional amendment affirmed by referendum in 1992 which requires that Kentucky Gubernatorial and Lieutenant Gubernatorial candidates run as a slate. KRS 118.127 provides in pertinent part that "[n]o candidate for Governor or Lieutenant Governor shall appear individually on the ballot for the nomination he is seeking."

Gable argues that the slating requirement infringes upon his First Amendment right to free political association and his rights under the Fourteenth Amendment and is not supported by any compelling or important state interest. The defendants argue that the issue before the Court is not one concerning free political association, but rather one of "ballot access." The defendants contend, in the alternative, that the slating requirement is supported by Kentucky's compelling interests in preventing factionalism and providing a stable government.

"Core political speech" is not regulated by these election code provisions, *McIntyre* v. *Ohio*, 115 S.Ct. 1511 (1995), and thus KRS 118.125 and 118.127 do not burden Gable's First Amendment Right to free political association.[2] Instead, these statutes burden Gable's right to access the ballot and thus are subject to the "ordinary litigation" test set forth in *Anderson* v. *Celebrezze*, 460 U.S. 708K (1983). The Court in *Anderson* held that when a state election law imposes only "reasonable, nondiscrimi-

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[2] These statutes do not prevent Gable, as an individual running for governor, from choosing whomever he wishes to be his running mate. Thus, Gable may be as free in his political association as he chooses.

natory restrictions", the state's "important regulatory interests are generally sufficient to justify; the restrictions. *Id.* at 788. It is undisputed that Kentucky's interest din preventing factionalism and in stabilizing government are recognized as compelling. *See, Storer* v. *Brown*, 415 U.S. 724, 736 (1974) *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974).

KRS 118.125 and 118.127 are found to be reasonable, nondiscriminatory, and virtually unobtrusive restrictions on Gable's right to access the gubernatorial ballot. Any burden on his First Amendment right to access is slight. Against this burden, Kentucky has compelling interests which were born of years of attempting to cope with factionalism in the gubernatorial race. Such state interests certainly justify the limited restrictions on ballot access imposed by KRS 118.125 and 118.127.

To conclude otherwise would sacrifice a measure of political stability gained by the enactment of the statutes for the interest of potential gubernatorial candidates who wish to "run alone", a result not mandated by the First *or* the Fourteenth Amendments." Accordingly the defendants' motion for judgment as a matter of law as to Count I must be granted.

II. COUNTS II AND VI — KRS 121.030(5), KRS 121.030(5)(a)

This Court must first determine whether KRS 121A.030(5) burdens Gable's right to free political expression and whether 121A.030(5)(a) creates benefits for participating slates which in effect burden Gable's constitutional 'right to free political speech. *See, Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). If Gable's right to free political speech is burdened, then the statutory provisions must be narrowly tailored to meet a compelling state interest in order to comport with the mandates of the First Amendment. *Id.* at 18.

KRS 121A.030(5) prohibits slates of candidates in the governor's race from accepting campaign contributions dur-

ing the thirty days immediately preceding a primary or general election, or during the fourteen days immediately preceding a primary run-off. KRS 121A.030(5)(a) lifts the expenditure limitation upon a participating slate in the event a non-participating slate exceeds $ 1.8 million in campaign expenditures, allowing either candidate to accept campaign contributions within thirty days of the election'. It also provides for additional public funding on a "2 to 1" ratio for a participating slate, once the expenditure limit has been lifted.[3]

Gable contends that these statutes *create* unconstitutional burdens as they: (1) prohibit him from contributing to his own, or any campaign, in the thirty days prior to a primary or general election; (2) use his spending as a "trigger" for lifting the spending cap on participating slates; and (3) use his spending as a trigger for making additional public funds available for the participating slates.

A. CANDIDATE'S CONTRIBUTION TO HIS OWN CAMPAIGN

There can be no doubt that a candidate cannot be restricted from contributing to and spending for his own candidacy. *Id.* In *Buckley* the Supreme Court conveyed the magnitude of the protected right to contribute to one's down campaign. *Id.* at 52-53. The defendants argue that the Court in *Buckley* found only that the amount of campaign contributions from a candidate may not be constitutionally limited.

Kentucky's Election Finance Reform laws prohibit candidates from contributing to their own campaigns during the reporting period. In the event the participating slate expends, or has accepted, more than $1.8 million in the course of the campaign, the prohibition is lifted and both

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[3] The term "participating slate" refers to slates of candidates who file a statement of intent that they will accept transfers from the public fund created by KRS 121A.020(1), and in turn limit their campaign spending to $1.8 million.

participating and non-participating slates may continue to accept contributions or make contributions to their own campaign. If the non-participating slate has not spent over $1.8 million, neither slate is allowed to accept contributions during the reporting period.

The Court in *Buckley* did not address the narrow question before this Court: whether a "time" restriction limiting when a candidate may contribute to his own campaign is constitutionally permissible. The Court did, however, hold that the contribution limitations of the Federal Election Campaign Act of 1971 imposed direct quantity restrictions on political communications, in addition to any reasonable time, place, and manner regulations and that such restrictions were unconstitutional. *Id.* at 18.

The government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. *See, Erznozik* v. *City of Jacksonville*, 422 U.S. 209, 209 (1975); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Adderly* v. *Florida*, 385 U.S. 39 (1966); and *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

The allowable time, place, and manner restrictions are not exceptions to the doctrine of the First Amendment. It cannot be seriously argued that the prohibition at issue does not restrict the quantity of political communication. This statutory provision prohibits any contribution during the reporting period, therefore it is more restrictive in scope than the limitation addressed by the Court in *Buckley*.

The instant action is' distinguishable' from that in *Cox*, where the Supreme Court found parading and picketing 'o be conduct "intertwined with expression and association." *Cox* v. *Louisiana*, 379 U.S. at 563-564. The Court in *Buckley* clearly held that the ability to contribute to ones own campaign is a "substantial restraint on the ability of persons to engage in protected First Amendment expression." *Buckley* v. *Valeo*, 424 U.S. at 52. Thus, contribution to ones own campaign is not merely conduct "intertwined with

expression" and association" but is political expression squarely protected by the First Amendment.

The defendants concede that the prohibition at issue has been constructed in part to prevent last minute media blitzes by a candidate. Thus, the governmental interest in preventing campaign contributions during the reporting period involves "suppressing communication." *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968). The Court in *Buckley*, found that governmental interest in regulating "giving or spending money 'arises in some measure because the communication allegedly integral to the conduct itself is thought to be harmful.'" *Buckley* v. *Valeo*, 424 U.S. at 17 (citing *United States* v. *O'Brien*, 391 U.S. at 382). The Court held that the primary governmental interest of preventing' actual and apparent corruption of the political process does not support a limitation on the candidate's expenditure of his own funds. *Id.* at 54. Moreover, administrative ease" is not a compelling state interest.

Accordingly, the contested statute abrogates any contribution for a 30 day period and does not merely "restrict" protected speech within the narrow scope of acceptable "time" limitations. To the extent that KRS 121A.030(5) limits a candidate's ability to contribute to his own campaign during the reporting period, the statute unconstitutionally restricts the candidate's First Amendment right to free political expression and Gable's motion for summary judgment on Count II must be granted. On the other hand, *Buckley* legitimatizes limiting contributions from other sources during the reporting period.

B. LIFTING THE CAP ON PRIVATE CONTRIBUTIONS

Clearly, the trigger mechanism allowing a non-participating to continue to raise money above the agreed $600,000.00 limit is not a burden upon Gable's right to free political speech. If Gable chooses to spend freely, this trigger mechanism will only promote political dialogue by lifting the spending cap from non-participating slates. Gable does not explain why he believes that the "use of his

spending" in this manner stifles his political expression or speech.

Moreover, the argument that the statute "chills" his free speech is not compelling. Again, Gable's freedom to spend is not restricted by KRS 121A.030(5)(a), and any "chill" upon his right to communicate is countered by Kentucky's compelling interest in combatting actual and apparent corruption of the political process.[4] *See, Wilkinson* v. *Jones*, 876 F.Supp. 916 (W.D.Ky. 1995).

C. ADDITIONAL PUBLIC FINANCING TRIGGERED BY SPENDING OF NON-PARTICIPATING SLATE

Gable argues that the incentive of additional "2 to 1" public funding is "coercive" and results in an unconstitutional burden upon his right to free political speech. The defendants rely upon the decisions in *Buckley, Wilkinson*, and the First Circuit Court of Appeals' decision in *Vote Choice, Inc.* v. *Distefano*, 4 F.3d 26, 38 (1st Cir. 1993), to counter Gable's argument.

The Court in *Buckley* squarely upheld the constitutionality of incentives created to encourage participation in expenditure limitation schemes. The Court rejected the "benefit equals burden" argument. Thus, this argument will not be successful here. Moreover, it is well established that without some evidence to the contrary, public financing schemes will not be treated as "punitive" measures. *See, Vote Choice, Inc.* v. *Distefano*, 4 F.3d at 38. However, the Court in *Buckley* and the court in *Vote Choice* acknowledged that although a statutorily created benefit does not *per se* result in an unconstitutional burden, such benefits could conceivably "snow ball" into a "coercive" measure upon a nonparticipating candidate. *Vote Choice, Inc.* v. *Distefano*, 4 F.3d at 39-40.

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[4] Apparently, Gable believes that the lifting of spending limits results in an incentive to the nonparticipating slate to accept expenditure limits. This may be true, but the United States Supreme Court upheld incentives for participation in publicly financed campaigns in *Buckley*.

There is no question but that the trigger provision allowing additional spending and continued "2 to 1" matching of funds restricts free political speech. It is a burden because the speech of a non-participating candidate is chilled in two ways. First, this particular incentive will result in some degree of tempering speech once the candidate's contributions near the $1.8 million mark. Second, speech will be stifled to some degree by the fear that the participating candidate will clearly "outspend" the non-participating candidate once the cap is lifted, given the additional "2 to 1" funding. Moreover, there is no question but that the state has a compelling interest in keeping campaign expenditures at levels that do not encourage actual or apparent corruption of the political process, i.e. to keep one candidate from essentially buying a campaign.

Gable argues that there is a point where incentives become coercive. This Court agrees, and although this theory is addressed by the court in *Vote Choice*, the First Circuit did not provide any concrete standard for determining when a restriction on political speech becomes coercive.

Once a First Amendment analysis of a statute reaches the point where burden and compelling state interest are no longer the questions, the focus becomes the invasiveness of the statute. Thus, whether a statute is unconstitutionally coercive is a matter of degree. Coerce is defined by Webster's New World Dictionary (2nd College Edition) as "to restrain or constrain by force." Without any evidence that the, statute literally forces the non-participating candidate to accept public financing, Gable's arguments must fail.

Very few, if any, legislative financing schemes will achieve perfect equipoise. Kentucky's law imposes restrictions upon non-participating candidates which must be accepted in order to reap the benefits. The financing program is available to any candidate which meets the eligibility requirements. Although the additional "2 for 1" incentive is very attractive, such desirability does not make

it coercive. Gable cannot articulate why the burden felt by a nonparticipating candidate subsequent to the cap lift is any heavier' than that felt before the cap is lifted. The particular restrictions on speech mentioned previously are not the result of undue force.

The Court can fathom a coercive scheme, for example "4 to 1" additional funding, at which time the non-participating candidate would have no legitimate way of staying in the race once the cap was lifted. At this juncture, the statute would be so restrictive as to literally "force" potential candidates to accept public funding, thereby unconstitutionally limiting the dissemination of information by candidates. Under the hypothetical, the candidate would not have a real choice but to participate in the scheme and would thus be coerced into accepting public funding.

Such is not the case with the statute at bar. Here, there is no argument that "2 for 1" funding makes it nearly impossible for the candidate running on private contributions to win the race. There is no argument that the statute effects, much less coerces, the initial decision made: whether the candidate can get his message to the public on $1.8 million or less. Accordingly, as there is no evidence that this statute creates an unconstitutionally coercive situation for a non-participating slate; the defendants are entitled to judgment as a matter of law as to Count VI of the complaint.

III. COUNT IX — KRS 121.150 (13) AND (20)

Gable argues that the limitation of his ability to loan money to his campaign constitutes a content based restriction on his right to free political speech. The defendants argue that contribution, not the act of loaning money, is a protected First Amendment right. They further contend that, in any event, these statutes are narrowly tailored to meet the state's interest in preventing the actual and apparent corruption of the political process.

KRS 121.150(13) and (20) prohibit a slate from loaning more than $50,000.00 to their campaign and establish that

any amount over $50,000.00 provided by a slate or their immediate families is deemed a contribution and is not recoverable. These statutes impinge very slightly upon the right to express political views, are reasonable, and thus are subject to the "ordinary litigation" test. *See, Anderson* v. *Celebrezze*, 460 U.S. 708 (1983).

Historically, Kentucky has had a tremendous problem with gubernatorial candidates making "windfall" loans to the campaign, which typically make the candidate financially vulnerable, and which are "repaid" with monies contributed by those seeking certain "favors" from the successful candidate. This problem is documented and does not merely exist in the minds of the defendants. Gable argues that the restrictions on contributions now obviate this problem, and that this statutory provision has no purpose. Gable's argument is not persuasive, however, as the threat of becoming indebted to those who contribute, solicit contributions, or encourage contributions for a particular gubernatorial candidate is real and immediate without a limitation on loans.

These regulatory statutes are, narrowly tailored to meet a very compelling interest in establishing and preserving integrity in Kentucky's political system. *See, Wilkinson* v. *Jones*, 876 F.Supp. 916 (W.D. Ky. 1995). Accordingly, summary judgment must be granted in favor of the defend ants on Count IX of the complaint.

IV. COUNT XVII — KRS 121.150(1)

Gable argues that KRS 121.150(1) restricts his free political speech and that it is so vague that a reader cannot discern what actually constitutes an "indirect" solicitation of an independent expenditure. The defendants contend that the statute is narrowly tailored to prohibit "agreements" between a candidate or his agents and an individual which are intended to circumvent the contribution and expenditure limitations.

First and foremost, independent expenditures on behalf of a candidate are allowed. The limitation on inde-

pendent expenditures imposed by KRS 121.150 is that the candidate may not request, cooperate in the making of, suggest, or consent to, the expenditure. Thus is the source of the label "independent" expenditure. Moreover, any person expending more than $500.00 in independent expenditures in any one election must report the expenditures to the registry. The statute does not limit the amount that may be spent independently in any one election. Moreover, the amount spent on an "independent expenditure" is not considered a contribution for the purposes of the statute. A person may independently expend money for whomever, however, and whenever during the election process he or she wishes. Clearly, the statute is constitutional on its face as it does not burden protected speech.

A direct solicitation is obvious: "Rent a billboard on I-64 with my name on it." A statement such as, "I certainly would like a billboard on I-64 with my name on it, but I cannot afford it, and I could not ask you to do that", would be an indirect solicitation.

It is true that "indirect solicitation" is not defined in the statute. While actions constituting indirect solicitations may be less obvious, political experience, logic, and reference to the purpose of the statute and the context in which "indirect" solicitation is used will aid the reader in determining what conduct is prohibited. Thus, the statute is not so vague as to restrict free political speech.

V. COUNTS XIX — XXII — KRS 121.0255 AND KRS 121.045

Gable argues that KRS 121.055 *and* KRS 121.045 impose content-based restrictions on political speech in violation of the First Amendment and that the restrictions are so vague as to deny him due process in violation of the Fourteenth Amendment. Gable concedes that it is the application of the statutes which renders them unconstitutional. The defendants contend that it is the interpretation given the statute' by Gable that renders Kit "questionable" and that the statute is not unconstitutional on its face nor

is it unconstitutional as applied by the Commonwealth.

Simply speaking, KRS 121.055 and 121.045 prohibit vote buying. In *Brown* v. *Hartlage*, 102 S.Ct. 1523, 1529 (1982), the Supreme Court held that the predecessor statute to KRS 121.055 was unconstitutional as applied under the circumstances presented, but found that the statute "presents little constitutional difficulty" in many of its possible applications. The Court also acknowledged that the statute is a "narrowly tailored means of promoting" the Commonwealth's compelling interest in preventing corruption. *Id.* at 1530.

The Court in *Brown* gave numerous examples of promises which would be protected by the First Amendment, such as promises to lower or raise taxes. The Commonwealth has been given specific direction by the United States Supreme Court on how to constitutionally apply this statute, reducing the possibility of misapplication in the future. Thus, the Court in *Brown* narrowed the construction of the statute to prohibit promises that amount to *quid quo pro* conduct, and to allow general campaign promises to voters. Accordingly, the Court's holding in Brown precludes a challenge to the facial validity of KRS 121.055. The constitutionality of the statute may only be challenged as to its application.

Gable does not allege that the state attempted to enforce this statute against him. Thus, as there is no challenge to the application of this statute, summary judgment in favor of the defendants on Counts XIX and XX is warranted.

Moreover, in *Lee* v. *Commonwealth*, 565 S.W.2d 634 (Ky. Ct. App. 1982), the Kentucky Appeals Court considered the constitutionality of KRS 121.045 and held it to be unconstitutional to the extent that it prohibits donations to a candidate for office of property valuator by persons whose property he may assess. Again, this is a statute which may be unconstitutional in its application. This Court, however, will not find a statute invalid on its face merely because it is possible to conceive of limited imper-

missible applications. *See, Leonardson* v. *City of East Lansing*, 896 F.2d 190 (6th Cir. 1982).

The Court in *Lee* gave some direction as to the scope of KRS 121.045 and how it may be applied in the future. As such, the statute has been narrowed, and although it is not artfully written, it cannot be said to be unconstitutionally vague or overbroad. *See, Broderick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Accordingly, Counts XXI and XXII must be dismissed as a matter of law.

V. COUNT XI — KRS 121.990(3), 121A.990(1)(a) AND (3)

KRS 121.990(3) and 121A.990(1)(A) and (3) set penalties for violations of various provisions of the act. To the extent penalties are set for the violation of laws which have been held to be constitutional, no argument as to restriction of free speech lies. However, penalties for the exercise of protected free speech is an additional restriction which cannot be tolerated. Thus, the penalties proscribed by the legislature will stand where such penalties are imposed upon a violation of the statutes which have been held to pass constitutional scrutiny.

Accordingly,

IT IS ORDERED HEREIN,

(1) That the defendants' motions for summary judgment [Record Nos. 71, 73, 75, 79] be, and the same hereby are, GRANTED, as to Counts I, VI, IX, XI, XVII, XIX, XX, XXI and XXII of the complaint;

(2) That the plaintiff's motion for summary judgment [Record No. 68] be, and the same hereby is, GRANTED as to Count II of the complaint;

(3) That the defendants Paul Patton, Ben Chandler and the Kentucky Registry of Election Finance and all persons in active participation or concert with them or who receive actual notice of this order by personal service or otherwise, are ENJOINED from enforcing Kentucky Revised Statute 121A.030(5) to the extent that it prohibits a slate of candi-

dates from contributing to their own campaign; and

(4) That Counts I, VI, IX, XI, XVII, XIX, XX, XXI and XXII of the complaint be, and the same hereby are DISMISSED.

This the 29th day of March, 1996.

/s/ Joseph M. Hood
Joseph M. Hood, Judge

Date of Entry and Service: 9/1/96

By: /s/ Christy Dearborn
District Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 95-12

ROBERT E. GABLE, and
DARRELL SEBASTIAN, - - - - - *Plaintiffs.*

v.

BRERETON C. JONES, Et Al., - - - *Defendants.*

PARTIAL DECLARATORY JUDGMENT—

Filed January 5, 1996

This matter is before the Court upon the parties' cross motions for summary judgment. After considering the briefs and oral arguments,

IT IS ORDERED AND ADJUDGED that as there is no genuine issue of material fact to be adjudicated as to KRS 121.150(2) or KRS 121A.080(6), the defendants are entitled to a partial declaratory judgment as a matter of law.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is found under 28 U.S.C. §§1391(b) and 1392. Declaratory relief is appropriate under 42 U.S.C. § 1963, 28 U.S.C. § 2201 and Fed.R.Civ.P. 57.

PARTIES

2. The Plaintiff, Robert E. Gable, is a resident of Franklin County, Kentucky, and was a duly qualified candidate for the Republican Party's nomination for the office of Governor of the Commonwealth of Kentucky in the 1995 primary election.

3. The Defendant-Counterclaimant, Kentucky Registry of Election Finance, is ran independent agency of the state government responsible for enforcing Chapter 121 and Chapter 121A of the Kentucky Revised statutes.

4. The Defendant-Counterclaimant, Joseph H. Terry, is chair of the Kentucky Registry of Electron Finance, and was sued in his official capacity.

5. The Defendant-Counterclaimant, Chris F. Gorman, is Attorney General, and was sued in his official capacity.

6. The Defendant-Counterclaimant, Bob Babbage, is the secretary of state and was sued in his official capacity

7. The Defendant-Counterclaimant, Paul Patton, is the Governor of the Commonwealth of Kentucky. Governor Patton was substituted for former Governor Brereton Jones, who was sued in his official capacity.

DEFINITIONS

8. As used in this Judgment, the term "Participating Slate" means a slate of candidates for Governor and Lt Governor who have filed with the Registry pursuant to KRS 121A.040(3) a statement of intent to accept transfers from the public fund established by KRS 121A.020(1).

9. As used in this Judgement, the term "Nonparticipating Slate" means a slate of candidates for Governor and Lt. Governor who have filed with the Registry pursuant to KRS 121A.040(3) a statement of intent to reject transfers from the public fund established by KRS 121A.020(1).

FACTS

10. Plaintiff moved the court for summary judgment regarding several provisions of Kentucky's campaign finance legislation contained in KRS chapter 121 and 121A. He sought declaratory and injunctive relief as to the challenged statutes.

11. Defendants submitted cross motions for summary judgment. They sought a declaratory judgment declaring the challenge statutes constitutional.

12. The Court heard oral argument on the cross motions for summary judgment on December 21, 1995.

13. KRS 121.150(2) provides as follows:

> Except as provided in KRS 121.180(10), the solicitation from and contributions by candidates, slates of candidates, campaign committees, political issues committees, permanent committees, and party executive committees to any religious, charitable, civic, eleemosynary, or other causes or organizations established primarily for the public good is expressly prohibited; except that it shall not be construed as a violation of this section for a candidate or slate of candidates to continue regular personal contributions to religious, civic, or charitable groups.

14. Plaintiff contends the statute means candidates for public office may only contribute to those charities to which they had regularly contributed prior to officially declaring their candidacies, and may only contribute in the amounts they had contributed prior to declaring their candidacies.

15. The Registry construes the statute to permit natural persons who become candidates for office to make charitable contributions without limitation. The Registry's construction limits the statute to prohibiting charitable contributions by the committees enumerated in the statute, namely, campaign committees registered by candidates, political issues committees, permanent committees and party executive committees.

16. KRS 121A.080(6) provides as follows:

> A slate of candidates shall establish a separate candidate campaign account for each primary, runoff primary, and regular elections in which it participates. The unexpended balance of contributions and fund transfers in a candidate campaign account of a slate of candidates which remains after all financial obligations of the particular ejection for which the account is established have been satisfied shall be forwarded to the registry for deposit in the fund when the account is closed. The payment to the fund shall be made not later than ten (10) working days after the candi-

> date campaign account for a particular election is closed. Funds in the candidate campaign account of a slate of candidates shall be expended only for expenses incurred in the particular election for which the account is established and shall not be used to pay expenses incurred in any other election or for any other purpose.

17. Plaintiff contends that this statute escheat to the slate the unexpended balance in the campaign account of Nonparticipating Slates, and therefore violates the rights to freedom of speech and association secured him by the First and Fourteenth Amendments of the united States constitution and further constitutes a taking without just compensation in violation of the rights secured Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

18. The Registry construes KRS 121A.060(6) to require only the "unexpended balance of contributions and fund transfers in a candidate campaign account" of a Participating Slate be forwarded to the Registry for deposit in the fund when the campaign account is closed (emphasis supplied). The Registry thus construes KRS 121A.080(6) to apply only to unexpended funds in the campaign account of Participating Slates and to have no application to unexpended funds in the campaign account of Nonparticipating States, which are governed by KRS 121.180(10).

DECLARATORY RELIEF

19. The court declares that, "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates* v. *Flipside, Hoffman Estates,* 455 U.S. 489, 494 n.5 (1981) (citing *Grayned* v. *City of Rockford,* 408 U.S. 104, 110 (1972).

20. The Court also declares that:

> [A statute] ought not be construed to violate the Constitution if any other possible construction remains available; under this canon of statutory construction, [t]he elementary rule is that every reasonable con-

> struction must be resorted to in order to save a statute from unconstitutionality. . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.

Rust v. *Sullivan,* 500 U.S. ___, 114 L.Ed.2d 233, 253 (1991) (internal quotation marks and citations omitted).

21. The Court declares that, in order to save KRS 121.150(2), it will adopt the narrowing construction offered by the Registry and interpret KRS 121.150(2) to mean that natural persons who become candidates for office may continue to make charitable contributions. Accordingly, KRS 121.050(2) is limited to prohibiting charitable contributions by the committees enumerated in the statute, including campaign committees registered by candidates.

22. The court declares that, in order to save KRS 121A.080(6), it will adopt the narrowing construction offered by the Registry and interpret KRS 121A.O80(6) to require that only the unexpended balance of contributions and fund transfers in a candidate campaign account of a Participating Slate be forwarded to the Registry for deposit in the fund when the campaign account if closed. (emphasis supplied). Accordingly, the Court declares that KRS 121A.080(6) does not apply to unexpended funds in the campaign account of Nonparticipating Slates, and that those funds are governed by KRS 121.180(1).

23. The Court further declares that there is no genuine issue of material fact as to KRS 121.150(2) and KRS 121A.080(6) and Defendants are entitled, as a matter of law, to a judgment dismissing the Third and Fourteenth causes of action asserted in Plaintiffs' Amended Complaint with prejudice.

This is the 5th day of January, 1996.

/s/ Joseph M. Hood
Joseph M. Hood, Judge

Date of Entry and Service:

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-897

In The

Supreme Court of the United States

October Term, 1998

ROBERT E. GABLE,

Petitioner,

v.

PAUL E. PATTON, A.B. CHANDLER, III, KENTUCKY REGISTRY OF ELECTION FINANCE, DONALD L. COX, MORRIS E. BURTON, JAMES E. BOYD and JOHN Y. BROWN, III,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT GOVERNOR PAUL E. PATTON'S BRIEF IN OPPOSITION

VIRGINIA HAMILTON SNELL
Counsel of Record
FRANK F. CHUPPE
DEBORAH H. PATTERSON
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202-2898
(502) 589-5235

DENIS FLEMING, JR.
General Counsel
Office of the Governor
The Capitol
700 Capitol Avenue, Suite 103
Frankfort, Kentucky 40601-3492
(502) 564-2611

Counsel for Respondent Paul E. Patton

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1488

PARTIES TO THE PROCEEDING

Kentucky Governor Paul E. Patton is one of several respondents in this Court. Other respondents are A.B. Chandler, III, Kentucky Registry of Election Finance, Donald L. Cox, Morris E. Burton, James E. Boyd, and John Y. Brown, III, all of whom, including Governor Patton, were defendant-appellees/cross-appellants below. The petitioner in this Court is Robert E. Gable, who was the plaintiff-appellant/cross-appellee below. Governor Patton has also filed a conditional cross-petition with this Court. Cross-respondents are Robert E. Gable, A.B. Chandler, III, Kentucky Registry of Election Finance, Donald L. Cox, Morris E. Burton, James E. Boyd, and John Y. Brown, III.

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OPINIONS BELOW

The Opinion of the court of appeals is reported at 142 F.3d 940 (6th Cir. 1998), and is attached to the Petition for a Writ of Certiorari at Appendix 1a. The Opinion of the district court is unreported and is attached to the Petition for a Writ of Certiorari at Appendix 28a.

JURISDICTION

The Brief in Opposition to Petition for Writ of Certiorari incorporates the Jurisdiction statement set forth in the Petition with the following addition. On December 17, 1998, William K. Suter, Clerk of the Court, granted the application of Respondent Governor Patton for an extension of time, through January 29, 1999, in which to file this brief in opposition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent Governor Patton concurs with the statement of Constitutional Provisions and Statutes Involved in the Petition.

STATEMENT OF THE CASE

Respondent Governor Patton incorporates herein the Statement of the Case as set forth in his Conditional

Cross-Petition docketed with the Court on December 30, 1998.

REASONS TO DENY WRIT

Review on a writ of certiorari is a matter purely of judicial discretion, to be granted only for the most compelling reasons. Petitioner Gable states that the questions raised in his Petition are ones of serious national importance. However characterized, the fact remains that these very questions were resolved fully and correctly in a court of appeals decision that comports entirely with precedents both from this Supreme Court and other circuits.

I. THE COURT OF APPEALS CORRECTLY FOLLOWED ESTABLISHED PRECEDENT IN HOLDING KENTUCKY'S TRIGGER PROVISION CONSTITUTIONAL.

In *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976), this Court sanctioned the use of public financing plans as a means for limiting a candidate's aggregate contributions and expenditures, which in turn works to combat actual and perceived corruption in the election process. As long as the plan is voluntary, and the candidate remains free to choose private financing over limited public financing, there is no First Amendment infringement on the rights of the candidate or supporters. *Id.*; *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280, 284 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

Years later, finding that a state has a compelling interest to stimulate participation in its public financing plans, federal courts agreed that states may, and often must, offer additional inducement to encourage candidates to accept voluntary spending limits. *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). The Trigger provision in Kentucky's campaign finance law effectuates just such an inducement.

Clearly, the biggest obstacle to a campaign finance reform program and its attendant spending constraints is the very real fear of participant candidates that they will be vastly outspent by their limitless, privately financed opponents. The Kentucky Trigger provision operates to alleviate that concern for participant candidates by releasing them from their voluntarily accepted expenditure limit of $1.8 million if their nonparticipant opponents' contributions exceed that mark. As a further incentive, and reward for voluntarily limiting expenditures to that point, participant candidates continue to receive public subsidy after their opponents' contributions trigger the suspension of the limit.

The court of appeals correctly held that the Kentucky incentives were no different in kind than clearly constitutional incentives and therefore did not impermissibly burden the First Amendment rights of Petitioner. Pet. App. at 15a. To find otherwise, the court stated, "would be making a distinction based on degree," which the *Buckley* decision explicitly forbids. *Id.* Certainly the intent and effect of the Trigger is to make participation in public funding the preferred choice among candidates. But, as

the court of appeals aptly recognized, "a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice." *Id.*

Gable disagrees with the court of appeals that participation in Kentucky's public financing program is a rational choice, arguing instead that participation is the only choice thereby leaving candidates "no choice at all." Pet. at 8-9. Nothing could be further from the truth. Voluntary public subsidy alternatives have vastly increased the options for campaign financing. To the extent Gable perceives his decision whether or not to accept public financing as a Hobson's choice endangering his First Amendment rights, such is a dilemma peculiar to him. As the Eighth Circuit explained in upholding a similar Minnesota trigger provision,

> In sum, the State has created a public financing scheme for certain elected offices which is available to candidates who meet certain threshold qualifications. This scheme presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary. Under this choice-increasing framework, candidates will presumably select the option they feel is most advantageous to their candidacy. Given this backdrop, it appears to us that the State's scheme promotes, rather than detracts from, cherished First Amendment values.

Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (citations omitted). *See Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) ("[Public funding provisions are] a congressional effort, not to abridge, restrict or censor speech, but rather

to use public money to facilitate and enlarge public discussion and participation in the electoral process . . . ").

Extraordinarily contrary to his "no choice" lamentations, Gable in fact retains, at least up to the final pre-election reporting period, not just choices regarding the Trigger but sole control over whether it is activated. In *Rosenstiel*, a Minnesota trigger provision originally released a participating candidate from expenditure limitations at the moment his opponent opted out of the public finance program. The legislature amended the provision to, like Kentucky's Trigger, releasing the participant only if and when his opponent exceeds the voluntary expenditure cap. 101 F.3d at 1551. The Eighth Circuit sanctioned the change, noting the extent to which the amendment puts the nonparticipating candidate, such as Gable, squarely in the driver's seat.

> Rather than releasing the participating candidate from the expenditure limits at the outset, the statute as it now stands permits the nonparticipating candidate to control whether and when the participating opponent will be freed from the limits. Thus, in a sense, the amendment works in favor of, rather than to the detriment of, the nonparticipating candidate.

Id. (citing *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D.Ky. 1995)).

It is therefore quite puzzling how Gable can complain that "the Kentucky trigger provision both fetters the constitutionally protected choices of candidates who forego public campaign subsidies and leaves such candidates worse off than they would have been without any public financing program at all." Pet. at 11. The fact that a candidate is now given the additional option to accept

public financing with its attendant trigger incentives and spending limitations cannot be said to "fetter" the private funding choice. Increased choices often require hard decisions. Candidates such as Gable are free to choose the alternative most advantageous to their particular campaign strategies. In that respect, First Amendment values are furthered, not smothered. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993). *See also Weber v. Heaney*, 793 F. Supp. 1438, 1457 (D. Minn. 1992) ("The First Amendment is not implicated where candidates remain free to choose between funding alternatives.").

Gable characterizes the Trigger incentive not as a carrot dangled by the state to lure candidates into public finance, admittedly constitutionally acceptable, but as a "substantial stick" designed to inflict on nonparticipants the "pain of Kentucky's publicly-financed retaliation." Pet. at 8-9. Courts have viewed such distinctions, even when expressed less dramatically, as more "semantic than substantive." *Vote Choice*, 4 F.3d at 38. The Trigger provision is, in reality, simply "a premium earned by meeting statutory eligibility requirements rather than a penalty imposed on those who either cannot or will not satisfy the requirements." *Id.*

Gable points to no explicit statutory restrictions on the amount of funds a nonparticipating candidate can raise. Instead, he claims to experience the penalty, the burden, the coercion, the "chill" on his constitutional rights by watching the benefits enjoyed by his publicly financed opponent. Courts have resoundingly rejected such a "benefits equal burdens" argument. The *Rosenstiel* Court explains the fallacy of Gable's position in the context of Minnesota's trigger provision:

> These inducements, however, do not per se render the State's scheme coercive because they are not inherently penal. Further, the inclusion of these additional inducements in the State's public financing package does not cause the package to become so benefit-laden as to create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns. Rather, by including these additional inducements, the State's scheme achieves a relative balance between the benefits provided to publicly financed candidates and the restrictions the candidates must accept. The expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute, is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit. We believe the statute is not coercive because it permits the nonparticipating candidate to raise a certain measure of funds before triggering the expenditure limitation waiver for his participating opponent.

101 F.3d at 1549-1551. *See also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993); *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280, 285 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980); *Weber v. Heaney*, 793 F. Supp. 1438, 1457 (D. Minn. 1992).

The Trigger mechanism contained in Kentucky's campaign finance law does not in any way restrict the speech of a nonparticipant candidate, as Gable claims. It does, however, work to **un**-restrict the speech of the participant candidate. By removing the government-imposed shackle on subsidized candidates, the ultimate net effect of an activated Trigger is to increase "dissemination of information from diverse and antagonistic sources" thereby promoting, rather than burdening, First Amendment values. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

II. THE COURT OF APPEALS CORRECTLY UPHELD THE 28 DAY TIMING WINDOW AS A CRITICAL COMPONENT TO KENTUCKY'S PUBLIC FINANCING SYSTEM.

The 28 Day Timing Window prohibits **any** slate of candidates for governor and lieutenant governor from knowingly accepting any campaign contribution after the final pre-election reporting deadline (twenty-eight days before a primary or general election, or fourteen days before a run-off primary), unless it or another slate has by that date reported contributions exceeding the $1.8 million voluntary expenditure limit. If the Trigger is pulled, **both** Nonparticipating and Participating Slates are permitted to accept contributions during the Window.

Gable equates the Window's restrictions to a ban on cheering in the final moments of a football game, a measure he suggests would "miss the very point of the enterprise." Pet. at 15. The problem with Petitioner's football analogy, of course, is that he wants the cheering at the

end of the game – or the eve of the election – to be *all* for him. Without the Window's timing restrictions, nonparticipant candidates like Gable would be able to blitz their expenditure-limited opponents with last-minute spending that could not be countered. Contrary to Gable's sports metaphor, the very point of the Window enterprise is not to ban speech at a critical period but to assure even-handed cheering that is reflective of the support for and views of **both** teams and/or candidates. *See Anderson v. Celebrezze*, 460 U.S. 779, 788 n.9 (1983) ("State has right to prevent distortion of electoral process by device of "party raiding," the organized switching of blocks of voters from one party to another in order to manipulate the outcome of the other party's primary election").

Truly, it is not the sheer number, but rather the diversity of views that ensures the "robust, democratic discussion" protected by the First Amendment. Gable's First Amendment rights are not burdened by a mechanism that assures a publicly financed candidate the opportunity to respond to last-minute, unreported contributions and accordingly to maintain meaningful participation in the election process. Without such an assurance, few candidates would agree to participate in Kentucky's campaign financing program designed to prevent corruption and preserve public confidence in the election process. The court of appeals correctly upheld the 28 Day Timing Window insofar as it applies to third party contributions.[1]

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[1] Governor Patton disagrees with the distinctions drawn by the court of appeals in upholding the law's restrictions on third party contributions but striking down restrictions on contributions made by the candidate himself, and requests this Court's review on the issue in his Conditional Cross-Petition.

CONCLUSION

Respondent Governor Patton respectfully requests that the Court deny the Petition which seeks review on the constitutionality of the Trigger provision and application of the 28 Day Timing Window to outside contributions.[2]

Respectfully submitted,

VIRGINIA HAMILTON SNELL
Counsel of Record
FRANK F. CHUPPE
DEBORAH H. PATTERSON
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

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[2] As submitted in Governor Patton's Conditional Cross-Petition, should the Court determine that Petitioner Gable has presented compelling reasons for review on these two questions, then the Court should also re-examine the constitutionality of the 28 Day Timing Window as it applies to a candidate's contribution to his own campaign. Further, Respondent/Cross-Petitioner Governor Patton notes that on January 25, 1999, this Court granted certiorari in *Nixon v. Shrink Missouri Government PAC*, 98-963. To the extent this Court determines the Kentucky law at issue in this Petition and Conditional Cross-Petition would be impacted by the Court's ultimate decision in *Nixon* and accordingly grants certiorari in this case, Respondent/Cross-Petitioner Governor Patton respectfully requests that certiorari be such that would allow him the opportunity to be heard on these issues so vital to Kentucky's interest in preventing corruption and preserving public confidence in its state elections through campaign finance reform.

DENIS FLEMING, JR.
General Counsel
Office of the Governor
The Capitol
700 Capitol Avenue, Suite 103
Frankfort, Kentucky 40601-3492
(502) 564-2611

Counsel for Respondent
Paul E. Patton

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In The

Supreme Court of the United States

October Term, 1998

ROBERT E. GABLE,

Petitioner,

versus

PAUL E. PATTON; A.B. CHANDLER, III; KENTUCKY REGISTRY OF ELECTION FINANCE; DONALD L. COX; MORRIS E. BURTON; JAMES E. BOYD; and JOHN Y. BROWN, III,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

VICTOR B. MADDOX
TACHAU MADDOX HOVIOUS & DICKENS PLC
200 South Fifth Street
Suite 200 North
Louisville, Kentucky 40202-3200
(502) 588-2000

Counsel of Record for Respondents, Kentucky Registry of Election Finance and Donald L. Cox

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3488

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I. STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate, ***so far as it goes***. But it does not go quite far enough in explaining the background of the case or the status of the parties. Examined in light of Kentucky's compelling interest in combating corruption in campaign fundraising, and in light of the particular aspects of Kentucky's unique approach to public subsidies in exchange for voluntary limits on fundraising and spending, it is clear that the Court ought not grant the petition sought in this matter to review Kentucky's truly unique system of public subsidies and permissible incentives for participation.

Episodes of corruption have been all too common in Kentucky politics.[1] Just since 1979, three Democratic governors have been multi-millionaires who funded their campaigns by loaning hundreds of thousands of dollars to their campaign committees, only collecting contributions to pay themselves back after they were nominated.[2] The lone Democratic candidate who was not independently wealthy, Martha Layne Collins, ran a campaign that nevertheless engaged in apparent abuse of the fundraising laws. Her husband was subsequently convicted of conspiring to extort contributions from those who sought to do business with the Commonwealth of Kentucky and

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[1] Miller, *Kentucky Politics and Government*, 20-34 (1994); Tapp and Klotter, *Kentucky: Decades of Discord, 1865-1900*, 314-48 (1977); Klein, *History of Louisville and Nashville Railroad*, 368-94 (1972).

[2] Total expenditures in gubernatorial elections rose from $1,548,733 in 1975, to $12,194,173 in 1991. Miller, *supra*, 219-26.

was sentenced to federal prison.[3] And during the 1990s, the FBI's investigation into campaign finance violations and bribery by special interests led to more than a dozen legislators being convicted or imprisoned, including the Speaker of the Kentucky House of Representatives.[4]

Against this backdrop, Kentucky enacted its unique system of public subsidies for gubernatorial slates that voluntarily agree to limit their fundraising and spending.

The trigger, Ky.Rev.Stat.Ann. ("KRS") § 121A.030(5)(a), and the 28-day window, KRS § 121A.030(5), are designed to encourage gubernatorial candidates to accept the voluntary expenditure limits which accompany public financing. The trigger provides a safety mechanism for Participating Slates in the event a Nonparticipating Slate spends more than the $1.8 million cap. If that occurs, KRS § 121A.030(5) "triggers" the Participating Slate's corresponding release from the $1.8 million cap. The Participating Slate is then permitted to raise more than $600,000, spend more than $1.8 million, and continue to receive the $2 for $1 match.

To enable the Kentucky Registry of Election Finance (the "Registry") to determine whether the $1.8 million

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[3] See *United States v. Collins*, 78 F.3d 1021, 1026 (6th Cir. 1996), *cert. denied*, 519 U.S. 872 (1996).

[4] See The (Louisville) Courier Journal, Nov. 26, 1995, p. D-3, col. 1; *BOPTROT; The Inside Story: 5 Years, 21 Convictions Later, Probe to End*, The (Louisville) Courier Journal, July 30, 1995, p. B-1; *Anatomy of a Scandal; BOPTROT: The Inside Story*, The (Louisville) Courier Journal, July 30, 1995, p. B-1. See also, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 162 (1997); *United States v. LeMaster*, 54 F.3d 1224 (6th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996); *United States. v. Blandford*, 33 F.3d 685 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995).

cap has been exceeded by a Nonparticipating Slate in sufficient time to lift the cap for Participating Slates, the 28-day window requires candidates to accept contributions before the final reporting period, which is 28 days prior to a primary or general election. The window enables the Registry to determine whether a Nonparticipating Slate has received contributions exceeding $1.8 million sufficiently in advance of the election to permit Participating Slates a meaningful opportunity to resume accepting contributions. By providing the mechanism that makes the trigger workable, the 28-day window supplies a vital ingredient in Kentucky's campaign finance reform.

Petitioner Robert E. Gable ("Gable") was a declared candidate for the Republican Party nomination in Kentucky's 1995 Republican gubernatorial primary. Although he met the filing requirements and his name appeared on the ballot, Gable was hardly a serious candidate. According to public records available from the Registry, (together with Donald L. Cox, the "Registry Respondents"), Gable raised and spent only $96,835 in the 1995 campaign. In contrast, the successful Republican candidate spent $1,233,223 in the primary election. Because he declined to participate in the system of public funding for gubernatorial elections created by the Kentucky General Assembly and implemented to combat corruption in Kentucky politics, Gable was ineligible to receive public funds otherwise available pursuant to KRS § 121A.020(1).

Shortly after the filing deadline for the 1995 Republican primary, Gable brought his challenge to the constitutionality of the entire statutory framework for public funding of Kentucky's gubernatorial elections. He claimed principally that the laws violated the United

States Constitution, Amendment I insofar as that amendment prohibits any law abridging the freedom of speech. Gable acknowledges that his is a facial challenge. (Petition 5). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

This Court has adopted a three-part inquiry for determining the constitutionality of a statute challenged on First Amendment grounds. First, the statute will be upheld if it does not truly burden freedom of expression. Second, even if it creates a burden, the statute may still be permissible if it furthers a compelling state interest. Third, if the statute furthers a compelling state interest, it will be upheld if it is narrowly tailored to further the compelling interest, instead of being overbroad and unnecessarily burdensome on free expression. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990); see generally *Buckley v. Valeo*, 424 U.S. 1 (1976). Because both the trigger and the 28-day window are narrowly tailored to serve compelling state interests in avoiding corruption in the election process, Kentucky's statutory plan for public subsidies to candidates who agree to limit fundraising and spending – thereby reducing corruption in the electoral process – meets this test.

After careful review, the District Court in this case found that Gable's challenge was largely without merit:

> Although the additional "2-for-1" incentive is very attractive, such desirability does not make it coercive. Gable cannot articulate why the burden felt by a nonparticipating candidate subsequent to the cap lift is any heavier than that felt

> before the cap is lifted . . . . [T]here is no evidence that this statute creates an unconstitutionally coercive situation for a non-participating slate . . . .

(Memorandum Opinion, Petition 35a-36a). The Court of Appeals affirmed, refusing Gable's invitation to second guess the Kentucky legislature by declaring the system of subsidies and incentives unconstitutional. As explained below, this Court should do likewise.

II. REASONS FOR DENYING THE WRIT

A. THE TRIGGER PROVISION OF KRS § 121A.030(5)(a) IS NOT UNCONSTITUTIONAL.

1. The Trigger Is Consistent With Established Principles And Is Not An Unconstitutional Burden On The Exercise Of First Amendment Rights.

Gable's challenge to the Kentucky statute requires first and foremost that he demonstrate that the 2-for-1 matching aspect of the trigger provision, coming into play after a Nonparticipating Slate of candidates exceeds the $1.8 million spending threshold, constitutes an unconstitutional burden on his First Amendment rights. But the stubborn reality of Kentucky's unique statutory scheme simply makes that impossible. Gable has a right to spend as much as he likes on his own campaign, he asserts, and this Court agreed in *Buckley*. And the simple truth is that Kentucky's plan of public subsidies in exchange for voluntary limits leaves him completely unfettered in his right to raise and spend money. Faced with this truth, Gable is forced to argue that public subsidies that match his own expenditures beyond $1.8 million at the rate of 2-for-1 constitute a *de facto* limitation on his ability to

raise and spend money. Thus, Gable suggests that his "fund-raising success is threatened or hammered [sic] with a state-financed counterattack funded out of all proportion to the actual popularity of the opponent's ideas." (Petition 11). Therefore, Gable argues, public subsidies that match private contributions 2-to-1 above a designated threshold are an unconstitutional burden on his right to spend.

In fact, Gable's effort to distinguish Kentucky's approach to public subsidies for campaigns from the essential elements of the statutes considered in *Buckley* is disingenuous. Gable asserts without basis that "a candidate who seeks to walk away from the public campaign finance program in order to preserve his right to make unlimited campaign expenditures simply cannot do so." (Petition 8). Regrettably, there is no basis in fact for that statement, for Gable is free to do exactly that. For that matter, Gable did exactly that in his 1995 campaign. Disregarding the plain language of the Kentucky statute, Gable observes that the provisions in *Buckley* "placed no limits on the amounts that nonparticipating candidates might raise or spend . . . " (Petition 8), as if to suggest that Kentucky's provisions do. But the reality is that neither Gable nor any other nonparticipating candidate in Kentucky is restricted in the least in the amount that he might raise or spend – just as in *Buckley*.

The Kentucky public financing plan follows the constitutional mandates identified in *Buckley*. A Participating Slate of candidates may choose to adopt voluntary limits on the total amount of contributions it may receive or expenditures it may make, in exchange for public financing. However, there are no limits at all on the total

amount of contributions Nonparticipating Slates of candidates who choose to reject public funding may collect. Consistent with *Buckley*, Nonparticipating Slates may also contribute unlimited amounts of their own money to their campaigns. And there is no limit at all on the amount a Nonparticipating Slate may spend. To the extent that spending is speech as *Buckley* teaches, the Kentucky law simply does not limit in any respect the "speech" of Gable or of any Nonparticipating Slate of candidates. On the contrary, if spending is speech, the provision for 2-for-1 matching subsidies above the trigger almost guarantees that there will be more speech, not less.

In this regard, Gable is wrong when he suggests that under Kentucky's approach, a nonparticipating candidate may not "raise and spend as many legal private contributions as he or she wishes . . . ." (Petition 11). Kentucky's legislation leaves Gable free to do exactly that. What it also does is insure that the campaigns of candidates who agree to voluntary limits will not be "overwhelmed by a counterattack funded out of all proportion to the actual popularity" of the nonparticipating opponent's ideas – to use Gable's words. Instead, the Kentucky approach gives Participating Slates the opportunity to respond to their opponents by removing the spending cap otherwise applicable to Participating Slates of candidates, and provides additional matching funds pegged not to the fundraising of the Nonparticipating Slates, but to their own fundraising. Were it otherwise, it would likely be impossible for a rational candidate to agree to spending limits, simply because the opponent would be permitted to spend a personal fortune, mount a carpet-bombing media

campaign, and obliterate the participating candidate's message.

The trigger and the 28-day window provide the incentive necessary to make public financing and the attendant spending limits pragmatically feasible for gubernatorial candidates. Without the assurance provided by the trigger, few candidates could be expected to accept the voluntary spending limits which accompany public financing, and thereby risk being dramatically outspent by nonparticipating opponents. Without the 28-day window, the Registry would be unable to pull the trigger far enough in advance of the election to permit Participating Slates a meaningful opportunity to respond to their nonparticipating opponents' spending above the $1.8 million cap. Accordingly, the trigger and the window provide inducements to accept public financing which are fully consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny.

Gable is wrong as well in his characterization of the statutory scheme as one "justified by an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." (Petition 12, quoting *Buckley*, 424 U.S. at 49). The record is plain that Kentucky's interest is in eliminating corruption in politics, by stopping the practice, for example, of selling access to state contracts for campaign contributions. See *United States v. Collins*, 78 F.3d 1021, 1027 (6th Cir. 1996) (former governor's husband convicted of conspiracy to violate Hobbs Act by illegally tying appointments and contracts to contributors). To further this compelling interest, Kentucky provides the Participating Slates the opportunity – not a guarantee – of additional spending by lifting the

cap, and matching 2-for-1 any additional fundraising the Participating Slate may achieve.

The trigger is a nondiscriminatory, content-neutral inducement, narrowly tailored to further Kentucky's compelling interest in eliminating actual and perceived corruption in the election process. Far from imposing an unconstitutional burden on Gable's right of free speech, the trigger facilitates a continued, vigorous exchange of political speech by assuring that a Participating Slate will be released from its voluntary spending limit once a nonparticipating opponent's contributions have exceeded that limit. The trigger produces more speech, not less. See *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997).

Another court has already reached this very conclusion regarding the trigger included in the Kentucky law:

> [Even if] the trigger provision chills speech to some degree, we find that it is a narrowly tailored means which addresses a compelling state interest . . . in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts

Wilkinson v. Jones, 876 F.Supp. 916, 928 (W.D. Ky. 1995).

Buckley squarely approved offering inducements to encourage candidates to accept voluntary spending limits. It follows that Kentucky does not unconstitutionally hamper a nonparticipating candidate's rights when it offers additional funds in reasonable proportion to the additional funds raised once a nonparticipating candidate exceeds the statutory cap. To the extent the

trigger provides for increased debate about issues of public concern, it promotes the free and open debate the First Amendment seeks to foster and protect. See *Mills v. Alabama*, 384 U.S. 214 (1966); see also *Buckley*, 424 U.S. at 92-93 (public financing of campaigns "furthers, not abridges, pertinent First Amendment values").

The critical flaw in Gable's reasoning is his notion that the benefit Kentucky confers on Participating Slates is indistinguishable from a burden on Nonparticipating Slates. But under *Buckley* benefits conferred upon Participating Slates are not unconstitutional burdens upon Nonparticipating Slates. 424 U.S. at 95 (and n. 127 regarding the multiple laws "providing financial assistance to the exercise of free speech."). Accord, *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1995); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993); *Weber v. Heaney*, 793 F.Supp. 1438, 1457 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993); *Republican National Committee v. FEC*, 487 F.Supp. 280, 285 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

From a constitutional perspective, one's right of expression is not burdened because the expression of another – who accepts the state's conditional offer of assistance – is subsidized. For example, in other cases this Court has held that a state is free to make childbirth a more attractive alternative than abortion, thereby influencing the woman's decision, so long as it imposes no restriction on access to abortions that was not already there. *Maher v. Rose*, 432 U.S. 464 (1977). Explaining that holding, the Court observed:

> Constitutional concerns are greatest when the State attempts to impose its will by force of law; ***the State's power to encourage actions deemed***

> ***to be in the public interest is necessarily far broader.***

Id. at 475-76 (emphasis added). Later, the Court made clear that a state does not unconstitutionally burden the exercise of First Amendment rights when it merely furthers its own value judgments by providing unequal subsidization of one form of expression over another, thereby "encourag[ing] alternative activity deemed in the public interest." *Harris v. McRae*, 448 U.S. 297, 315 (1980).

Kentucky's 2-for-1 subsidy for Participating Slates, matching private expenditures of Nonparticipating Slates above $1.8 million, does not limit in any way the quantity of the Nonparticipating Slate's fundraising or spending. Gable remains free to spend as he likes, irrespective of Kentucky's legislation. His constitutional right to expression is no more burdened than was that of the plaintiff in *Harris*. In *Harris*, the Court confirmed that none of the unconstitutional burden cases implied any limitation on the authority of a state to make a value judgment favoring one expression of First Amendment rights over another, and to implement that value judgment with public funds. 448 U.S. at 314.

The same is true here. Kentucky has placed no limit on any expression of First Amendment rights. It has made a value judgment that as a policy matter, it prefers limited spending to unlimited spending, and it has implemented that judgment with public subsidies. As well, it has acted to further a compelling state interest to fight corruption and to limit the influence of money in politics. To encourage candidates to accept those limits and subsidies, it has provided the opportunity for a Participating Slate to raise and spend additional funds, beyond the $1.8

million spending cap otherwise applicable to Participating Slates, in the event that a Nonparticipating Slate exceeds the cap. And to insure that the logistical problems attendant to reporting spending beyond the threshold do not render that opportunity to respond to spending by Nonparticipating Slates meaningless, Kentucky has established a narrowly-tailored, content-neutral window during which a candidate may not receive outside contributions. All of this is entirely consistent with *Buckley*.

Just as the state in *Maher* had made childbirth a more attractive alternative, thereby influencing the woman's decision, but had imposed no restrictions on access to abortions that did not already exist, Kentucky has influenced the decision whether to participate in the public financing program it created, but has not restricted in any way the ability of a nonparticipating candidate such as Gable to spend as much as he likes.

Moreover, Gable misapprehends the holding of cases like *Memorial Hospital v. Maricopa Co.*, 415 U.S. 520 (1974) and *Speiser v. Randall*, 357 U.S. 513 (1958), when he suggests that Kentucky's trigger is constitutionally flawed because it makes extra funding contingent on his exercise of protected speech. Those cases held that the state may not impose a fine on an individual's decision to exercise a fundamental right, or condition receipt of a benefit on his decision to forgo that exercise. Those cases did not hold that a state is precluded from extending public funds to others, following the exercise of such rights, as a means of implementing the state's permissible value judgment regarding campaign funding while furthering a compelling state interest in eliminating corruption.

In fact, the *Maher* Court highlighted a point that Gable seems unwilling to confront. The unconstitutional condition cases he cites such as *Memorial Hospital* involved burdens imposed by the state that were analogous to criminal penalties. *Maher*, 432 U.S. at 474 note 8. But that is not true here. Just as Arizona was not obliged to "pay the bus fares" of indigent travelers to avoid constitutional infirmity, so Kentucky is not obliged to muzzle the speech of Participating Slates once a Nonparticipating Slate exceeds the threshold. Not only is Gable denied no benefit otherwise available to him but for his exercise of First Amendment rights, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969), but neither was he directly penalized for exercising his rights through, for example, the use of the state's taxing authority. See, e.g, *Speiser, supra.*

Nor is Gable's reliance on cases like *Miami Herald Pub. Co. v Tornillo*, 418 U.S. 241 (1974) helpful. That case also involved a penalty. The statute compelling the newspaper to print a reply in that case was found to be a penalty both because it took away space from other speech and cost money, and because it intruded into the editorial process. Therefore, under the operation of the Florida statute, "political and electoral coverage would be blunted or reduced." Id. at 257. By contrast, Kentucky does not require Gable to pay for his opponent's speech, or demand that he print it. Similarly, in *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986), the Court struck down a statute that compelled one exercising First Amendment rights to also convey competing points of view. The other cases are of similar effect, and this Court has observed that these cases depend for their conclusions on the analogy between the effect of the

government action involved and the imposition of a criminal fine, simply in response to the exercise of First Amendment rights.[5]

Here, there is nothing of the sort. Kentucky has not retaliated against Gable, and its trigger provision does not lead to retaliation against any Nonparticipating Slate of candidates. No funding that a Nonparticipating Slate would otherwise be entitled to under the law is withheld when the trigger goes into effect. No fine of any sort is levied. ***In fact, Kentucky does nothing at all with respect to the candidate who chooses to exercise his First Amendment rights by spending more than $1.8 million.*** Kentucky withholds nothing, and imposes nothing. It

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[5] In this regard, the Court's reasoning in *Bordenkircher v. Hayes*, 434 U.S. 357 (1977) is instructive. In *Bordenkircher*, the Court observed that "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' – and permissible – 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' " 434 U.S. at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973)). Just as it followed in *Bordenkircher* that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty," 434 U.S. at 364, this Court's express approval and encouragement of campaign subsidies, see *Buckley* at 90, suggests quite strongly that the Court has accepted as constitutionally legitimate provisions such as the trigger, which simply provide appropriate – and permissible – incentives to participation.

simply provides for additional funds, reasonably related in amount to the additional funds raised by the Participating Slate after a Nonparticipating Slate exceeds the threshold, to allow for more discussion of the issues, not less.

Gable's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991) is equally misplaced, for that case demonstrates plainly why Kentucky's approach is constitutionally permissible. In *Rust*, the Court held that it is not unconstitutional for the government "to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals . . . ." Id. at 194. In that case, abortion rights advocates complained that by funding doctors who advocated alternative methods of family planning but not abortion, as the Title X funds involved required, while barring funding to doctors who counseled abortion, the government had unconstitutionally denied their First Amendment rights by facilitating the expression of one point of view without also facilitating the expression of the alternative view.

The Court held otherwise, reasoning that the law simply involved the government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded. This Court's reasoning in *Rust* is equally applicable here:

> Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition . . . . Within far broader limits than petitioners are willing to concede, when the Government appropriates

> public funds to establish a program it is entitled to define the limits of that program.

Id. at 194.

Notwithstanding Gable's suggestion to the contrary, Kentucky does not single out any campaign because of any concern for the popularity of its ideas. None of the cases Gable cites involved conferring a benefit on a third party as a result of the petitioner's exercise of free speech. And none of those cases equated the benefit to the third party with a burden on the speaker.

On the contrary, the *Maher* Court pointed out that a state is free to provide subsidies to some candidates but not all candidates even if that results in one candidate's speech being enhanced to the detriment of the other. Speaking specifically in the context of subsidies available to one political candidate that were not available to another, the Court noted that "[a]ny disadvantage suffered by operation of the eligibility formulae . . . is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates." Id., note 9 (quoting *Buckley*, 424 U.S. at 94-95). Thus, the Court has already rejected the central premise of Gable's argument, that the government may not subsidize one's exercise of First Amendment rights if by doing so it has the effect of hampering the effectiveness of another's expression.

In *Republican National Committee*, the three-judge court rejected almost precisely Gable's challenge. The plaintiff there made the same "benefits equals burdens" argument advanced by Gable in this case:

> We have no difficulty concluding that the imposition of such conditions lies within Congress' power to legislate . . . and that, as long as the candidate remains free to engage in unlimited

> private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters . . . . The fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right or, where there is such a diminution, the burden is justified by a compelling state interest.

487 F.Supp. at 284-85. Here, of course, Gable and every Nonparticipating Slate is completely free to "engage in unlimited private funding and spending. . . . "

More recently, the First Circuit flatly rejected Gable's "benefits equals burdens" argument in *Vote Choice, Inc. v. DiStefano, supra*. In that case, a candidate contested the Rhode Island statute which permitted publicly financed candidates to receive matching contributions in amounts twice as large as the limit on contributions to candidates rejecting public financing. The First Circuit unanimously rejected an analysis indistinguishable from Gable's:

> [The benefit provided to candidates agreeing to expenditure limits] is, therefore, a premium earned by meeting statutory eligibility requirements rather than a penalty imposed on those who either cannot or will not satisfy the requirements . . . .
>
> [T]he distinction that [Plaintiff] struggles to draw between denying the carrot and striking with the stick is, in many contexts, more semantic than substantive . . . . The question whether Rhode Island's system of public financing imposes a penalty on non-complying candidates or, instead, confers a benefit on those who do comply is a non-issue, roughly comparable to bickering over whether a glass is half full or half

> empty . . . . [T]he blurred line between benefit denials and penalties is singularly unhelpful in the zero-sum world of elective politics. Because a head-to-head election has a single victor, ***any*** benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office. In the last analysis, then, [Plaintiff's] fancied distinction proves too much.

4 F.3d at 38 (emphasis in original).

The Eighth Circuit has also considered Gable's "benefits equals burdens" reasoning, and reached the same conclusion. *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997). At issue in that case was a Minnesota statute very much like Kentucky's trigger provision. Under the Minnesota statute, "the triggering event . . . occurs when any non-participating opponent reaches a specified threshold in campaign contributions or expenditures." Id. at 1547. In upholding the Minnesota trigger provision, the Eighth Circuit echoed the First Circuit's analysis:

> These inducements, however, do not per se render the State's scheme coercive because they are not inherently penal.
>
> Further, the inclusion of these additional inducements in the State's public financing package does not cause the package to become so benefit-laden as to create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns. Rather, by including these additional inducements, the State's scheme achieves a relative balance between the benefits provided to publicly financed candidates and the restrictions the candidates must accept. The expenditure limitation waiver, which permits a publicly

> financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.
>
> We believe the statute is not coercive because it permits the nonparticipating candidate to raise a certain measure of funds before triggering the expenditure limitation waiver for his participating opponent. Rather than releasing the participating candidate from the expenditure limits at the outset, the statute as it now stands permits the nonparticipating candidate to control whether and when the participating opponent will be freed from the limits.

Id. at 1550-1551. See also, *Weber v. Heaney*, 793 F.Supp. 1438, 1457 (D. Minn. 1992) ("The First Amendment is not implicated where candidates remain free to choose between funding alternatives").

As the District Court said in this case:

> Here, there is no argument that "2-for-1" funding makes it nearly impossible for the candidate running on private contributions to win the race. There is no argument that the statute effects, much less coerces, the initial decision made: whether the candidate can get his message to the public on $1.8 million or less.

(Memorandum Opinion, Petition 36a).

Gable complains that Participating Slates will receive a subsidy no matter how much his fundraising success is

due to the popularity of his ideas, and no matter how much the matching funds will "distort the apparent popularity of the participating candidate." (Petition 8). But he misses the point. A Participating Slate receives 2-for-1 matching funds after the cap is lifted not based on the opponent's fundraising success, but on its own. And Kentucky's funding provisions are content neutral. Once it raises the qualifying amounts, a slate qualifies for the public subsidy irrespective of the popularity of its ideas.

Further, Gable's implicit suggestion that his potential fundraising prowess is an accurate measure of "the popularity of his ideas", (Petition 8) is off the mark from a constitutional perspective. Because he is free to contribute and spend as much of his own money as he likes, but for the trigger a wealthy candidate like Gable could raise and spend millions more in his campaign than could a Participating Slate. Yet the aggregate amount of dollars raised and spent would say nothing about the "popularity of his ideas" relative to those of his opponent. And it is precisely because of the long history of corruption that surrounds the fundraising process in Kentucky that the state sought to implement its permissible value judgment and to cap, if possible, the amount of contributions that might be needed in the first place.

In an age of campaigning by sound bite, Gable seems inclined to pursue constitutional jurisprudence by snippet. His suggested Hobson's choice, and his reference to *New York v. United States*, 505 U.S. 144 (1992), is an example of this approach. *New York* involved an analysis of an act of Congress imposing obligations on the states with respect to the disposal of low level radioactive waste. The legislation essentially gave the states a choice between two plainly unconstitutional options, and violated the

separation of powers aspects of the constitution and the Tenth Amendment.

Gable's snippet from *New York* has no relation to the issues raised in this petition, and does nothing to demonstrate any choice between two unconstitutional alternatives. Quite the contrary, Kentucky offers participating and nonparticipating candidates alike a perfectly permissible alternative: agree to limit your fundraising and spending, and the state will subsidize your campaign with two dollars for every dollar you raise privately. Or spend as much as you chose to, i.e., engage in as much constitutionally protected speech as you like, and the state will assist any candidate who has agreed to the limits with additional 2-for-1 matching funds above a given threshold. In other words, the state will see to it that if the nonparticipating candidate engages in more speech, the participating candidate will have an opportunity to do so as well.

Seen in this light, Gable's fanciful Hobson's choice is in reality little more than a choice between two perfectly constitutional options: less spending and public funds, or more spending by participating and nonparticipating slates alike. Gable is perfectly free to walk away from the public campaign financing program offered by Kentucky. He did so in the 1995 campaign.

2. Because Gable Is Not A Declared Candidate In The Current Gubernatorial Campaign, He Lacks Standing.

In his petition, Gable suggests that he "has expressed his interest" in running for governor of Kentucky in the 1999 gubernatorial race. (Petition 5). In fact, Gable has not

filed papers with the Kentucky Board of Elections declaring his candidacy in the Republican Party primary for the 1999 gubernatorial election. Under Kentucky law, he is no longer eligible to do so, since the filing deadline for the May 25, 1999 primary election was January 26, 1999. KRS § 118.165.

Consequently, Gable's asserted interest in running for governor at this point is entirely academic, and he lacks standing. The standing question involves an analysis concerning "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490 (1975). The standing inquiry has two parts:

> First, whether the plaintiff-respondents allege "injury in fact" that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and, second, whether as a prudential matter, the plaintiff-respondents are proper proponents of the particular legal rights on which they base their suit.

Singleton v. Wulff, 428 U.S. 106, 112 (1976). See also *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

Without question, Gable at this point lacks the sufficiently concrete interest in the outcome of the suit he originally filed to make it a case or controversy for purposes of Article III jurisdiction. His interest is no more concrete than that of more than 3.7 million other Kentuckians who will not run for the nomination of their party for the office of governor in the upcoming election. As such, he plainly lacks a sufficiently concrete interest in the matter to confer standing. *Singleton*, 428 U.S. at 112. See also, *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S.

101, 105 (1944) (the Court will "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). Gable's failure to file papers declaring himself a candidate in the 1999 gubernatorial election in Kentucky removes any vestige of standing he may once have had to assert this facial challenge to the constitutionality of Kentucky's campaign finance laws, and renders his challenge moot.

Even if Gable could meet the technical requirement for injury in fact, he plainly is not a proper proponent of the particular rights in question. Because he only raised and spent $95,835, Gable never approached the threshold for triggering the release to his Republican primary opponent of the additional public funds. Absent a clearer indication of serious intent in the current campaign, Gable's somewhat half-hearted 1995 campaign ought not to serve as the basis for the frontal assault on Kentucky's unique comprehensive approach to campaign finance reform and the elimination of corruption that he has mounted.

Moreover, Gable may not assert standing – as he attempts to do – because of any concern for the rights or interests of other candidates generally, whether in future Kentucky elections or in elections to be held in other states. (Petition 7). Thus, Gable's general references to campaign financing laws in other states, as well as his reference to the need for this Court to "clarify the application of *Buckley* to such measures," amounts to little more than an attempt to bootstrap his own abstract interest into a sufficiently concrete interest. Equally unhelpful to the standing analysis is Gable's effort to invoke the rights of hypothetical candidates in elections yet to be called, whose claim to office "might [be] . . . cast into

doubt" (Petition 7), absent this Court's decision to consider his challenge to Kentucky's unique system of incentives and public subsidies.

A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499. See also, *Barrows v. Jackson*, 346 U.S. 249, 255-56 (1934). Especially in light of his failure to file as a candidate in the 1999 Republican primary, Gable's claim for relief rests almost entirely on the abstract rights or interests of others. As such, he fails to establish either element of standing, and this Court ought not review such an intricate constitutional question under the circumstances.

3. Kentucky's Unique System Is Not Sufficiently Similar To Those Of Other States To Warrant Review.

Wholly apart from the technical standing issues, this Court ought not grant the writ because the statutory provisions reviewed below are neither in conflict with the provisions of other states nor sufficiently analogous to those of other states to provide an appropriate framework for undertaking the kind of overall review of campaign finance legislation in light of the First Amendment that Gable claims is in order.[6]

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[6] Of course, the District Courts in Kentucky as well as the Sixth Circuit itself have had little difficulty in analyzing the issues regarding Kentucky's approach that have been brought before them thus far. In addition to the decisions below, see *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D.Ky. 1995) and *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 162 (1997).

Recognizing that he cannot suggest such a split in the decisions of the Courts of Appeals, Gable tries to suggest instead that his case nonetheless raises "issues of serious national importance", issues that "were not resolved by this Court's decision in *Buckley*. . . . " (Petition 6). Suggesting without asserting that other states have enacted publicly funded campaign finance reforms essentially similar to Kentucky's, Gable suggests as well that "a growing number of states are adopting schemes designed to inhibit political expenditures indirectly." Id.

To give some credence to his "everybody is doing it like Kentucky" argument, Gable alludes to campaign finance reform measures enacted in Maine, Arizona, Massachusetts, Colorado, Minnesota, Michigan, and Rhode Island. (Petition 7). Of these, Gable only suggests two – Maine and Arizona – that even arguably operate within the same basic framework as does the Kentucky system, by providing additional subsidies to participating candidates after a nonparticipating candidate has both opted out of the system and raised or spent more than a legislatively determined threshold.

The other states offer far different incentives, a point that Gable acknowledges only obliquely, and one that simply highlights how unrelated to the issues in this case the issues that might arise in those other states are likely to be. And for good measure, Gable argues ominously that "advocates of campaign finance reform are actively seeking to promote similar efforts in other states . . . " (Petition 7), suggesting the need for some prophylactic general discussion post-*Buckley* of constitutional principles potentially relevant to corruption fighting legislation.

In fact, Gable's principal argument for granting the writ is likely the strongest argument for denying it. "Whether such measures [enacted by other states] unconstitutionally penalize nonparticipating candidates' rights to spend political money free of government-imposed limits," (Petition 7), is hardly a question that can best be addressed in the context of this matter. Kentucky's program of public funding for Participating Slates of candidates is unlike those mentioned in the petition.

For example, Gable cites the Maine provisions found at 21 Me.Rev.Stat.Ann. §§ 1121-1128, enacted in 1996. Yet the District Court that considered an initial challenge to that law found that even in the context of a dispute in that state, the matter was not ripe for adjudication.

> State election campaigns . . . in the year 2000 . . . are conditioned on too many intervening contingencies to make this matter appropriate for review in federal court now. The outcome of the intervening 1998 election; unforeseen issues confronting the Legislature and the electorate in 1999 and 2000; these politicians' career choices . . . ; political shifts – the list is endless . . . .

Daggett v. Devine, 973 F. Supp. 203, 204 (D. Maine 1997).

It seems unnecessary to point out that this Court does not issue advisory opinions, and does not decide constitutional questions "unless such adjudication is unavoidable." *Spector Motor Service*, 323 U.S. at 105. Thus, Gable's suggestion that "if this Court does not clarify the application of *Buckley* to ***such measures***," (Petition 7), then those other statutes may be subject to multiple lawsuits, as well as his suggestion that "uncertainty about the constitutionality of ***such measures*** will" – somehow – "disturb the orderly process of electoral decisionmaking . . . " (id.), is little more than an appeal for this Court

to grant the petition as a prelude for some sort of exegesis on the constitution and campaign finance law generally.

In truth, the suggestion by Gable that failure to grant the petition might permit continued uncertainty about the constitutionality of other campaign finance reform measures, thereby casting into doubt the outcome of some future elections which, one supposes, might actually bring down our entire system of government, seems quite farfetched. As well, it seems to reflect the realization that whatever the merits of the Kentucky approach, its unique aspects and limited application to broader constitutional issues makes it particularly unsuited to serve as the platform from which to launch the broadside attack on campaign finance reform measures generally that Gable and his ACLU confederates have in mind.

B. THE 28-DAY WINDOW BANNING OUTSIDE CONTRIBUTIONS FOR A LIMITED PERIOD OF TIME IS NOT UNCONSTITUTIONAL.

As for the ban on contributions during the 28 days preceding an election effected by KRS § 121A.030(5), the Court of Appeals struck down that portion of the law that barred contributions by the candidates themselves to their own campaigns during the 28 days preceding an election. It upheld the 28-day window provision only with respect to outside contributions. The Registry has not challenged that aspect of the Court of Appeals ruling. At the same time, the ban on outside contributions during this administratively critical period of time is a narrowly tailored provision plainly designed to address a compelling state interest, one consistent with *Buckley* and the constitution generally.

Gable acknowledges that to the extent that the trigger is constitutional, the 28-day window is an integral part of the overall statutory plan. (Petition 17). Gable acknowledges as well that this Court in *Buckley* upheld restrictions on the right of candidates to receive contributions. (Petition 16 quoting the Court of Appeals below, noting that the right of candidates to receive contributions did not emerge "unfettered from the *Buckley* decision.").

But Gable asserts that because Kentucky regulates the timing rather than the amount of contributions a candidate is permitted to receive, its provision is more restrictive of speech and less relevant to preventing corruption than were the restrictions approved in *Buckley*. (Petition 16).

This Court, however, has acknowledged that it should be reluctant to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982). And Gable cannot challenge the fundamental purpose behind Kentucky's campaign finance provisions. "The government interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized . . . ." Id. The pervasive history of corruption in Kentucky politics, and the corrupting effects of fundraising abuses that have sent former residents of the governor's mansion, Speakers of the House and any number of other high state officials to federal prison cannot be denied. Gable may be concerned with casting into doubt the outcome of some future elections (Petition 7), but Kentucky's General Assembly was justly concerned with the erosion of public

confidence in the Commonwealth's own elections. This is a fully permissible concern of the state government, one that justifies substantial deference.

Given that the 28-day window is a vital component of the public subsidy arrangement, one that is narrowly tailored and logically related in scope and operation to both the trigger provision itself and the goal of combating corruption, it plainly satisfies the requirements of *Buckley* and the constitution generally. As the Court of Appeals noted, under the 28-day window, "[c]andidates will be forced to rearrange their fundraising by concentrating it in the period before the 28-day window begins . . . but . . . such a restriction is justified by Kentucky's interest in combating corruption." (Petition 18a-19a). Given the length of modern campaigns, this modest burden is plainly insufficient to overturn the entire legislative plan.

CONCLUSION

For these reasons, the Registry Respondents, Kentucky Registry of Election Finance and its Chairman, Donald L. Cox, respectfully request that the Court deny the petition for a writ of certiorari. In the event, however, that the Court decides to grant the writ, the Registry Respondents agree with Cross-Petitioner Patton that the entire ruling of the Court of Appeals, including its decision to invalidate that part of KRS § 121A.030(5)

prohibiting external contributions during the 28 days preceding an election, should be reviewed.

Respectfully submitted,

TACHAU MADDOX HOVIOUS & DICKENS PLC
VICTOR B. MADDOX
200 South Fifth Street
Suite 200 North
Louisville, Kentucky 40202-3200
(502) 588-2000

Counsel of Record for Respondents, Kentucky Registry of Election Finance and Donald L. Cox

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROBERT E. GABLE, - - - - - *Petitioner*

versus

PAUL E. PATTON; A.B. CHANDLER, III; KENTUCKY REGISTRY OF ELECTION FINANCE; DONALD L. COX; MORRIS E. BURTON; JAMES E. BOYD; and JOHN Y. BROWN, III, - - - - - *Respondents*

REPLY TO BRIEFS IN OPPOSITION

ROBERT ABELL
ACLU Cooperating Attorney
P.O. Box 983
Lexington, Kentucky 40588-0983
(606) 254-7076

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-9875
Counsel of Record

DAVID A. FRIEDMAN
General Counsel
American Civil Liberties Union
of Kentucky
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 581-1181

Counsel for Petitioner

February 5, 1999

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

REPLY TO BRIEFS IN OPPOSITION

1. The Brief in Opposition of the Kentucky Registry Respondents asserts that Petitioner Gable lacks standing to challenge the constitutionality of Kentucky's campaign finance regulations because he is not a declared candidate in this year's gubernatorial campaign even though he ran for governor in 1995 and has expressed interest in running again. Registry Opp. Br. 21-24. This assertion is without merit.

It is well established that persons who have been deterred from acting by the very laws they allege to be unlawful have suffered sufficiently personal and concrete injury to challenge those laws. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362-67 (1977) (holding that non-applicants for a job may receive relief from racially discriminatory employment practices that deterred them from applying). This is especially true in the election context. For example, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court entertained a challenge to a state's early filing deadline for a place on the presidential ballot, even though the candidate bringing the challenge had missed that deadline. Similarly, in *Clements v. Fashing*, 457 U.S. 957, 962 (1982), this Court recognized the standing of state officeholders to challenge a state rule that required them to resign from their jobs if they ran as candidates for another office, even though none of the challengers had chosen to resign in order to run.

Gable likewise is entitled to challenge a campaign finance law he alleges violates his First Amendment rights, even if he declines to campaign for the governorship unless and until that constitutional defect is removed. Kentucky's election finance laws plainly act as a deterrent to those challengers who, like Gable, do not think that running a race under such restrictions is worth the candle. *See* Al Cross, *Election 1999; GOP Adds Candidate for Governor;*

Peppy Martin files; Other Races Conceded, Louisville Courier-Journal, Jan. 27, 1999, p.1b (noting that Kentucky Republican leaders attributed their party's "lack of interest in the governor's race" in large part to the fact that it "was unwinnable because of the law that limits spending by candidates who agree to take public financing"). It is hardly Gable's fault that Kentucky has kept the challenged regulations in force while this litigation has exceeded the duration of an entire election cycle.

Nor is Gable's challenge "moot," as the Registry Respondents allege, *see* Registry Opp. Br. 23. Precisely because constitutional questions about election practices are difficult to resolve within a single election cycle, this Court has repeatedly declined to find election challenges moot even after the election that gave rise to the challenge is long since over. *See, e.g., Storer v. Brown,* 415 U.S. 724, 737 n.8 (1974) (holding that a challenge to restrictions on independent candidacies could proceed even after an election because the issues it presented would "persist as the . . . statutes are applied in future elections"); *Moore v. Ogilivie,* 394 U.S. 814, 815-16 (1969) (likewise holding that a challenge to election statutes was justiciable because "capable of repetition, yet evading review"). These precedents plainly foreclose any mootness holding here.

2. Both Briefs in Opposition claim that Kentucky's public campaign financing law is a mere selective subsidy scheme that does not burden First Amendment rights because it leaves a candidate who declines to participate no worse off with the program than he would be without it. *See* Registry Opp. Br. 5-21; Patton Opp. Br. 2-8. This claim is incorrect. Kentucky is of course free under this Court's precedents to subsidize only those candidates who agree to participate in the state's scheme, and such a selective subsidy is not in itself a burden on the nonparticipating candidate's rights. But that is not what Kentucky has done. Instead, Kentucky has made its grant of addi-

tional benefits to a participating candidate contingent upon a nonparticipating candidate's own exercise of First Amendment rights. If and only if the nonparticipating candidate spends above $1.8 million does the state lift spending restrictions on participating candidates and match their further fundraising efforts 2-for-1 with public funds. Such a scheme crosses over the line from a simple nonsubsidy of a nonparticipating candidate's speech to a penalty upon that speech, and thus warrants this Court's review.

Nothing in this Court's precedents concerning speech subsidies authorizes a government to make a particular exercise of private speech the trigger for a state-subsidized response. To the contrary, the Court's only decisions reviewing analogous triggers have invalidated them. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). The Registry Respondents attempt to distinguish those cases on the ground that they involved a tax upon the burdened speakers, who were required in effect to pay for the dissemination of their opponents' speech. *See* Registry Opp. Br. at 13-14. But this attempt is unavailing. For one thing, *Tornillo* and *PG&E* rested on twin First Amendment concerns: the right not to speak was infringed if the compulsory reply was carried, but the right to speak was infringed if the speaker chose silence to ensure that it was not. As the Court stated in *Tornillo*, "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy," in which case "political and electoral coverage would be blunted or reduced." 418 U.S. at 257. The Kentucky campaign finance statute has precisely such a deterrent effect on protected political expenditures, and for that reason alone warrants this Court's review. In addition, the Kentucky scheme itself imposes an effective tax upon the non-

participating candidate's speech: once he spends more than $1.8 million, he must raise three times as much as the participating candidate in order to stay even.

The difference between a mere nonsubsidy and a subsidy penalizing the exercise of constitutional rights would be clear in any other context. For example, it is one thing for the government to subsidize childbirth but not abortion; it would be quite another for the government to pay a doctor, for every abortion he performed, three times his fee for that service earmarked for the delivery of newborns. It is one thing for the government to offer to pay for a court-appointed psychiatrist to assess a criminal defendant's competence; it would be quite another for the government to provide that if he chooses to pay for his own psychiatric expert the government will fund three psychiatrists to ensure adequate rebuttal. Similarly, the government is free to choose what speech to fund, but it may not deploy subsidies invidiously "in such a way as to [aim] at the suppression of dangerous ideas." *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (citations and internal quotes omitted). Thus, contrary to Respondents' assertions, the decision below is not consistent with the relevant precedents of this Court.

3. Registry Respondents suggest that Kentucky's campaign finance scheme is too idiosyncratic to warrant this Court's review. Registry Opp. Br. at 24-27. Yet they themselves suggest that any rational public financing scheme would adopt a "trigger" mechanism like Kentucky's. *See* Registry Opp. Br. at 7-8 ("Were it otherwise, it would likely be impossible for a rational candidate to agree to spending limits . . . ."); *see also* Patton Opp. Br. at 9. If that is so, then it is all the more likely that the issues presented here will continue to arise in more and more states. Registry respondents concede that at least several states have already enacted laws like Kentucky's. Registry Opp. Br. at 25. Accordingly, the Petition presents issues of national

importance and electoral urgency warranting this Court's review.

4. Respondents each assert that Kentucky's total ban on campaign contributions during the twenty-eight days preceding an election is a "vital" or "critical" component of the state's efforts to combat the corruption of candidates. *See* Registry Opp. Br. at 29; Patton Opp. Br. at 8. But they fail to offer a single explanation why that is so. While they colorfully chronicle "the pervasive history of corruption in Kentucky politics," Registry Opp. Br. at 29, they offer not an iota of evidence to suggest *when* in an election cycle such corruption allegedly occurs. Nor do they explain why limits on the amount of each contribution are insufficient to prevent capture of political candidates by large donors, without any additional restrictions on the timing. Like a law that authorized the publication of newspapers or books on politics during only eleven months of the year, the 28-day ban does not merely channel but limits the quantity of speech at the core of the First Amendment, and thus warrants this Court's review.

CONCLUSION

For the reasons expressed here and in the Petition for Certiorari, Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

ROBERT ABELL
ACLU Cooperating Attorney
P.O. Box 983
Lexington, Kentucky 40588-0983
(606) 254-7076

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-9875
Counsel of Record

DAVID A. FRIEDMAN
General Counsel
American Civil Liberties Union
of Kentucky
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 581-1181

Counsel for Petitioner

February 5, 1999